

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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C. L. BOSS,

Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS &  
PEAKE AUTOMOBILE COMPANY, a Cor-  
poration, and E. W. A. PEAKE,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Oregon.

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FILED

APR 12 1923

F. D. MONCKTON,  
CLERK.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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C. L. BOSS,

Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS &  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

JOHN F. LOGAN and ISHAM N. SMITH, Mohawk  
Building, Portland, Oregon,

For the Appellant and the Appellee Boss &  
Peake Automobile Company.

JOHN S. COKE, United States Attorney for the  
District of Oregon, and THOMAS H. MA-  
GUIRE, Assistant United States Attorney for  
the District of Oregon, Old Post Office Build-  
ing, Portland, Oregon,

For the Appellee, The United States of  
America.

JOHN F. REILLY, Platt Building, Portland, Ore-  
gon, and WINTER and MAGUIRE, Title and  
Trust Building, Portland, Oregon,  
For Appellee, E. W. A. Peake.

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In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Citation on Appeal.**

United States of America,

District of Oregon,—ss.

To United States, Plaintiff and Appellee, E. W. A.

Peake, Defendant and Appellee, and Boss &

Peake Automobile Company, a Corporation,

Defendant and Appellee, GREETING:

WHEREAS C. L. Boss, defendant and appellant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in favor of said United States and against said C. L. Boss and Boss & Peake Automobile Company, and also in favor of said E. W. A. Peake and against said C. L. Boss, and has given the security required by law:

YOU ARE, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why said decree should not be corrected and speedy justice should not be done the parties in that behalf. [1\*]

Given under my hand at Portland, in said district, this 2d day of February, in the year of our Lord one thousand nine hundred twenty-three.

CHAS. E. WOLVERTON,

Judge. [2]

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\*Page-number appearing at foot of page of original certified Transcript of Record.

United States of America,  
District of Oregon,—ss.

Due, legal and timely service is hereby accepted  
of the foregoing citation on appeal at Portland,  
Oregon, this 3d day of February, 1923.

THOS. H. MAGUIRE,  
Asst. U. S. Atty.,  
Attorney for Plaintiff,  
JOHN F. REILLY and  
WINTER and MAGUIRE,  
Attorneys for E. W. A. Peake.  
JOHN F. LOGAN,  
ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Co. [3]

[Endorsed]: No. L—8786. 27—231. In the Dis-  
trict Court of the United States for the District of  
Oregon. United States, Plaintiff, vs. Boss & Peake  
Automobile Company, et alia, Defendants. Citation  
on Appeal. U. S. District Court, District of Oregon.  
Filed Feb. 3, 1923. G. H. Marsh, Clerk.

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In the District Court of the United States for the  
District of Oregon.

November Term, 1921.

BE IT REMEMBERED, That on the 16th day of  
January, 1922, there was duly filed in the District  
Court of the United States for the District of Ore-  
gon, an amended bill of complaint, in words and  
figures as follows, to wit: [4]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Amended Bill of Complaint.**

COMES NOW United States of America by Lester W. Humphreys, United States Attorney for the District of Oregon, and leave of Court first having been obtained presents this its bill of complaint against the defendant herein, and in that behalf plaintiff alleges:

**I.**

That on and prior to the 1st day of June, 1917, defendant Boss & Peake Automobile Company was a corporation organized for profit having capital stock represented by shares, and was duly incorporated under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland, Oregon.

**II.**

That during all of said times, the capital stock of the defendants Boss & Peake Automobile Company consisted of 300 shares, that the defendant C. L. Boss owned and held 149 shares of said capital



stock, and the defendant E. W. A. Peake owned and held 149 shares of said capital stock.

### III.

That the said defendant Boss & Peake Automobile Company, a corporation, during the period from January 1, 1917, to June 1, 1917, was a corporation subject to the payment of the tax imposed by the Revenue Act of 1917 and the Revenue Act of 1916. [5]

### IV.

That the entire net income of the said defendant Boss & Peake Automobile Company, a corporation, received by it from all sources during the time from January 1, 1917, to June 1, 1917, subject to the payment of such tax imposed by the provisions of said Revenue Act of 1917 and Revenue Act of 1916, was \$22,549.94, upon which said amount it was liable to pay to the said plaintiff excess profits tax in the sum of \$11,757.77 and in addition thereto taxes in the sum of \$647.53, making a total tax due of \$12,405.30.

### V.

That defendants have not paid said sum, nor any part thereof, except the sum of \$6,202.65, and there is now due, owing and unpaid to plaintiff the sum of \$6,202.65, with 5 per cent penalty amounting to \$310.13, and interest at one per cent per month from August 15th, 1920, on the sum of \$6,202.65.

### VI.

That during the month of June, 1917, defendant Boss & Peake Automobile Company, a corporation, dissolved and the assets of said defendant corpora-

tion were distributed to and received by the defendants C. L. Boss and E. W. A. Peake. Plaintiff is not informed of the exact amount received by each of said defendants in such distribution of assets, but such sums are well known to the defendants and each of them, and plaintiff alleges that the distributive share of each of the defendants, Boss & Peake so distributed to and received by them as aforesaid, was in excess of \$6,500.

#### VII.

That by reason of the aforesaid dissolution of the said corporation and the distribution of the assets thereof to the said defendants Boss & Peake, as aforesaid, the said corporation is and has been without assets from which plaintiff could collect the taxes due it. [6]

#### VIII.

That plaintiff has no plain, speedy, adequate and complete remedy of law, but only in equity to enforce the liability of the stockholders as hereinbefore alleged.

#### IX.

That demand has been made upon the defendants and each of them for the payment of the sums of money due as aforesaid, and that defendants and each of them have failed and refused to pay said sums.

WHEREFORE, plaintiff prays for a decree that it have and recover from the defendants, and each of them, the sum of \$6,202.65, with interest thereon at the rate of 1 per cent per month from August 15, 1920, together with 5 per cent penalty on said

sum of \$6,202.65, and the costs and disbursements of this suit, and for such other and further relief as to the Court may seem equitable.

LESTER W. HUMPHREYS,

United States Attorney for Oregon. [7]

United States of America,

District of Oregon,—ss.

I, Lester W. Humphreys, being first duly sworn, say:

That I am United States Attorney for the District of Oregon; that the facts set forth in the foregoing amended complaint are true as I verily believe; that I base this affidavit of verification upon reports submitted to me by the Bureau of Internal Revenue, Treasury Department of the United States of America.

LESTER W. HUMPHREYS.

Subscribed and sworn to before me this 14th day of January, 1922.

[Seal]

JOHN C. VEATCH,

Notary Public for Oregon.

My commission expires 11/14/24.

Served 14 Jan. 1922.

JOHN F. LOGAN,

Atty. for Boss & Peake Automobile Co. and C. L.

Boss.

JOHN F. REILLY,

Atty. for E. W. A. Peake.

Filed January 16, 1922. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 31st day of January, 1922, there was duly filed in said court an answer and cross-bill of Boss & Peake Automobile Company and C. L. Boss, in words and figures as follows, to wit: [9]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Answer and Cross-bill of Boss & Peake Automobile  
Company and C. L. Boss.**

Come now the Boss & Peake Automobile Company, a corporation, and C. L. Boss, individually, and answering the complaint of the United States of America, admit, deny and allege as follows, to wit:

**I.**

Admit that on and prior to the 1st day of June, 1917, the defendant Boss & Peake Automobile Company was a corporation, organized for profit having capital stock represented by shares, and was duly incorporated under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland.

## II.

That these answering defendants admit that at all of said times the capital stock of the defendant Boss & Peake Automobile Company consisted of 300 shares; that the defendant C. L. Boss owned and held 149 of said shares of said capital stock and that the defendant E. W. A. Peake owned and held 149 shares of said capital stock; in connection with the ownership of said capital stock, these answering defendants allege that at the time of the organization [10] of said corporation on November 8, 1916, W. H. Bietau subscribed for 2 shares of the capital stock of said corporation and that during the month of March, 1917, the said 2 shares owned by the said W. H. Bietau were divided so that thereafter, and during the life of said corporation, and until June 1, 1917, 1 of said shares was held in the name of W. H. Bietau and one share was held in the name of R. E. Murphy; that in truth and in fact the said corporation was so organized as to be controlled equally, share and share alike, between this answering defendant, C. L. Boss, and the defendant, E. W. A. Peake, and that the shares of stock held by W. H. Bietau and R. E. Murphy were held for qualifying and voting purposes only.

## III.

Admit that said defendant Boss & Peake Automobile Company, a corporation, during the period from January 1, 1917, to June 1, 1917, was a corporation subject to the payment of the tax imposed by

the Revenue Act of 1917 and the Revenue Act of 1916.

#### IV.

Admit that the entire net income of the said defendant Boss & Peake Automobile Company, a corporation, received by it from all sources during the time from January 1, 1917, to June 1, 1917, subject to the payment of such tax imposed by the provisions of said Revenue Act of 1917 and Revenue Act of 1916, was \$22,549.94, upon which said amount it was liable to pay to the said plaintiff excess profits tax in the sum of \$11,757.77 and in addition thereto taxes in the sum of \$647.53, making a total tax due of \$12,405.30. [11]

#### V.

Admit that the defendants have not paid said sum, nor any part thereof, except the sum of \$6,202.65, which was paid by the defendant C. L. Boss and these answering defendants admit that there is now due, owing and unpaid to the plaintiff the sum of \$6,202.65, with interest at the rate of one-half of 1 per cent per month from August 15, 1920, on the sum of \$6,202.65, but whether there should be a penalty of 5 per cent, amounting to \$310.13, or any part thereof, or whether there should be interest charged in excess of one-half of 1 per cent per month from August 15, 1920, these answering defendants have no knowledge or information sufficient to form a belief and therefore as to this matter deny the same upon the ground and for the reason that these answering defendants have always acted in good faith, without negligence, and with a wish to pay what-



ever sums were due the Government under the circumstances and the law applicable thereto.

VI.

Admit that during the month of June, 1917, the defendant Boss & Peake Automobile Company dissolved, and the assets of said corporation were distributed to and received by the defendant C. L. Boss and the defendant E. W. A. Peake; that the said assets were divided, share and share alike, between the defendant C. L. Boss and the defendant E. W. A. Peake, as is more fully set out in the separate answer and defense and cross-bill as between the said defendant C. L. Boss and the defendant E. W. A. Peake, hereinafter in this answer set out, annexed and made a part hereof; defendants further admit that the distributive [12] share of each of the defendants C. L. Boss and E. W. A. Peake was in excess of \$6,500.00.

VII.

Admit that by the aforesaid dissolution of the said corporation and the distribution of the assets thereof to the said defendants C. L. Boss and E. W. A. Peake, the said corporation is and has been without assets from which the plaintiff could collect the taxes due it.

VIII.

Admit that the plaintiff has no plain, speedy, adequate and complete remedy at law, but only in equity to enforce the liability of the stockholders as herein alleged.

IX.

Admit that demand has been made upon the de-

fendants, and each of them, for the payment of the sums of money alleged to be due in the amended complaint herein, as aforesaid, and admit that the defendant E. W. A. Peake has failed and refused to pay said sums or any part thereof but deny that this answering defendant, C. L. Boss has refused to pay said sums and alleges that the said C. L. Boss has paid the full sum of \$6,202.65, as is more fully set out in the separate answer and defense and cross-bill as between the said defendant C. L. Boss and the defendant E. W. A. Peake as herein-after in this answer set out, annexed and made a part hereof; in this connection these answering defendants allege that the balance of \$6,202.65 with such penalty and interest as is chargeable in law, is properly due from and chargeable to the defendant E. W. A. Peake and further in this connection these answering defendants allege that the defendant, E. W. A. [13] Peake is a man of property and well able to respond to a judgment obtained by plaintiff.

The defendants Boss & Peake Automobile Company, a corporation, and C. L. Boss, individually, by way of a separate answer and defense and as and for a cross-bill and cross-complaint against the defendant E. W. A. Peake, individually, in accordance with the equity rules of this Court, allege:

I.

That prior to November 8, 1916, the defendant C. L. Boss, was engaged in the automobile business in the City of Portland, State of Oregon, as one of the members of a partnership known and desig-



nated as C. L. Boss & Company, which partnership was composed of C. L. Boss, Oscar J. Closset and the late Joseph Closset, deceased; that the business, pursuit and occupation of said partnership of C. L. Boss & Company was the purchase and sale of automobiles with its office in the City of Portland, State of Oregon.

## II.

That on or about November 6, 1916, there was organized, under and by virtue of the laws of the State of Oregon, a corporation as shown by the certificate of the Corporation Commissioner of the State of Oregon, dated November 8, 1916, which corporation was known and designated as the Boss & Peake Automobile Company; that the defendant C. L. Boss and the defendant E. W. A. Peake and one, [14] W. H. Bietau, were the incorporators of such corporation and complied with all the laws of the State of Oregon with reference to the organization of domestic corporations; that stock subscriptions were opened for the capital stock of said corporation on November 8, 1916, and that thereupon the defendant C. L. Boss subscribed to 149 shares at a par value of \$14,900.00 and the defendant E. W. A. Peake subscribed to 149 shares at a par value of \$14,900.00 and that the said W. H. Bietau subscribed to 2 shares at a par value of \$200.00; the entire capital stock of said corporation was 300 shares, each share being of the par value of \$100.00.

## III.

That the said defendant corporation Boss &

Peake Automobile Company, which is the same corporation designated as one of the defendants herein, continued in operation as a corporation from November 25, 1916, to June 1, 1917; that as soon as said corporation was organized the corporate stock of said corporation was divided as follows:

The defendant C. L. Boss 149 shares.

The defendant E. W. A. Peake 149 shares.

That during the month of March, 1917, the 2 shares owned by W. H. Bietau were divided so that the shares were thereafter held during the life of said corporation and until June 1, 1917, as follows:

1 share in the name of W. H. Bietau and 1 share in the name of R. E. Murphy; that in truth and in fact the said corporation was so organized as to be controlled equally, share and share alike, by the defendant C. L. Boss and the defendant E. W. A. Peake, and that the shares of stock held by [15] W. H. Bietau and R. E. Murphy were held for voting and qualifying purposes only.

#### IV.

That at the outbreak of the great war in 1917 the said E. W. A. Peake became alarmed as to the future of the automobile business and particularly as to the financial market condition of such business and thereafter, and particularly after the month of March, 1917, until the 31st day of May, 1917, the said defendant E. W. A. Peake sought to bring about a dissolution or liquidation of the said defendant corporation Boss & Peake Automobile Company; that the business affairs of said corporation were conducted in such a way after January

1, 1917, that each one of said defendants C. L. Boss and E. W. A. Peake could tell at any time what the earnings were, based upon satisfactory estimated statements continuously brought down to date showing cost, overhead charges and a satisfactory estimated profit; that after the declaration of war by the United States, the defendant E. W. A. Peake, continued to view with alarm the future and thereafter, among other things, proposed a dissolution of said defendant corporation Boss & Peake Automobile Company by dividing the property of said defendant corporation between the defendant C. L. Boss and the defendant E. W. A. Peake, share and share alike.

V.

That on the 23d day of May, 1917, the defendant E. W. A. Peake made definite proposals to divide the properties of the corporation according to his 50 per cent interest by taking over one-half of the properties in kind or moneys worth; that on the 31st day of May, 1917, the properties and assets of the said defendant corporation Boss & Peake Automobile [16] Company, were by agreement between the defendant C. L. Boss and the defendant E. W. A. Peake, divided and it was then agreed that the said defendant corporation Boss & Peake Automobile Company should be at once dissolved.

VI.

That thereafter on the next day, June 1, 1917, a copartnership was formed between the defendant C. L. Boss and R. J. McRell, which copartnership then and thereafter and ever since has been known

and designated as the C. L. Boss Automobile Company and the said defendant corporation Boss & Peake Automobile Company was dissolved and ceased to do business from and after the month of June, 1917; that on the said 1st day of June, 1917, the said defendant E. W. A. Peake received his 50 per cent interest of the properties and assets of said defendant corporation Boss & Peake Automobile Company, in property, security and moneys, amounting to \$26,083.65, being one-half of the value of the physical properties and assets of the said defendant corporation Boss & Peake Automobile Company; that on said date the said defendant E. W. A. Peake recognized the existence of the said copartnership of C. L. Boss Automobile Company by dealing with it and receiving contract assurances from it and by dealing with it as a new firm and the successor of the defendant corporation Boss & Peake Automobile Company; that in particular the said defendant E. W. A. Peake on June 1, 1917, loaned money to the said copartnership C. L. Boss Automobile Company, and took from the said copartnership, as security for said loan, the identical automobiles theretofore and prior to the 31st day of May, 1917, the property of the defendant corporation Boss & Peake Automobile Company. [17]

## VII.

That on June 1, 1917, the said defendant corporation Boss & Peake Automobile Company, in accordance with the agreement theretofore made between the defendant C. L. Boss and the defend-

ant E. W. A. Peake, and in accordance with the copartnership agreement between the defendant C. L. Boss and R. J. McRell, the said Boss & Peake Automobile Company ceased doing business as a going concern and during the month of June, 1917, the said Boss & Peake Automobile Company, a corporation, prepared papers of dissolution in accordance with the laws of the State of Oregon; and particularly, on June 22, 1917, a resolution of dissolution, in accordance with Section 6701, L. O. L., was duly and regularly adopted and thereafter, in due course, on July 17, 1917, a certificate of dissolution was issued out of and under the seal of the Corporation Commissioner of the State of Oregon.

### VIII.

That from and after June 1, 1917, the said copartnership, C. L. Boss Automobile Company, did business as a copartnership and a separate business entity and that from and after June 1, 1917, the said copartnership of C. L. Boss Automobile Company made return to the Government of the United States under the Revenue Act of 1917, and that ever since said date the copartnership of C. L. Boss Automobile Company has made return to the Government of the United States of its activities as such copartnership and the proper officers of the United States Government have ever since June 1, 1917, made audit of said copartnership, C. L. Boss Automobile Company, beginning June 1, 1917; that the said defendant corporation Boss & Peake Automobile Company [18] continued as a corporation



until June 1, 1917, when it was succeeded on the same day by the said C. L. Boss Automobile Company.

### IX.

That on June 1, 1917, the defendant E. W. A. Peake, according to previous agreement, did business with the copartnership C. L. Boss Automobile Company and the defendant E. W. A. Peake well knew at that time that the said C. L. Boss Automobile Company was to start in business at the liquidation of the defendant corporation Boss & Peake Automobile Company, to wit: on June 1, 1917, and the said defendant E. W. A. Peake did recognize on said last named date the existence of the copartnership C. L. Boss Automobile Company and the nonexistence of the defendant corporation Boss & Peake Automobile Company, by accepting the notes of the said copartnership C. L. Boss Automobile Company.

### X.

That at the time of the agreement between the defendant C. L. Boss and the defendant E. W. A. Peake for the liquidation of the defendant corporation Boss & Peake Automobile Company, neither party had in contemplation the Revenue Act of 1917, and particularly neither party had contemplated the retroactive effect of said Revenue Act; that the claimed liability of said defendant corporation Boss & Peake Automobile Company, or of the individual defendants C. L. Boss or E. W. A. Peake, did not come to the notice of any of them until apprised by notice from the proper author-

ities of the United States some time thereafter; that later on the defendant C. L. Boss, in accordance with notice from the United States Internal Revenue Service, tendered to the Government one-half of the \$12,405.30 as soon as the definite sum was ascertained; that [19] on August 17, 1920, the defendant C. L. Boss paid to the United States Internal Revenue Service at the office of the Collector, the full sum of \$6,202.65, being the proper charge as of date August 17, 1920; that this payment was made upon the claim of the defendant C. L. Boss, that under the Revenue Act of 1917, he, the said C. L. Boss, was responsible as the owner of one-half of the physical properties of the said corporation defendant, Boss & Peake Automobile Company at the time said assets were divided and the said corporation ceased to do business and was dissolved, and that the balance due on said income tax of \$12,405.30, together with interest and penalty, if any there be, should properly be chargeable to the individual defendant E. W. A. Peake.

WHEREFORE these answering defendants having fully answered plaintiff's complaint pray a decree of this Court as follows:

1. That the bill of complaint as against these answering defendants be dismissed.
2. That as between the defendant C. L. Boss and the defendant E. W. A. Peake the said C. L. Boss be decreed and adjudged to have individually paid as of August 20, 1920, the full sum due from the said C. L. Boss to the plaintiff as stockholder and officer of the said Boss & Peake Automobile Com-

pany under the Revenue Act of 1916 and/or the Revenue Act of 1917.

3. That as between these answering defendants and the defendant E. W. A. Peake, the said defendant E. W. A. Peake should be held, decreed and adjudged to be the party liable to the plaintiff for any delinquent income tax in the Revenue Act of 1916 and/or the Revenue Act of 1917. [20]

4. For such other and further relief as to the Court may seem meet, and just, and equitable.

JOHN F. LOGAN,

Attorney for Boss & Peake Automobile Company  
and C. L. Boss.

State of Oregon,

County of Multnomah,—ss.

I, C. L. Boss, being first duly sworn, say that I am one of the defendants in the within entitled cause, and that the foregoing answer is true as I verily believe.

C. L. BOSS.

Subscribed and sworn to before me, this 31st day of January, 1922.

[Seal]

JOHN F. LOGAN,

Notary Public for Oregon.

My commission expires 5 December, 1923.

Service admitted Portland, Ore., January 31, 1922.

JOHN F. REILLY,

Attorney for Deft. Peake.

JOHN C. VEATCH,

Assistant U. S. Attorney.



Filed January 31, 1922. G. H. Marsh, Clerk.

[21]

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AND AFTERWARDS, to wit, on the 6th day of February, 1922, there was duly filed in said court an answer of E. W. A. Peake to amended bill of complaint, in words and figures as follows, to wit: [22]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Answer of E. W. A. Peake to Amended Bill of  
Complaint.**

Comes now the defendant E. W. A. Peake by John F. Reilly and Winter & Maguire, his attorneys, and for answer to plaintiff's amended bill of complaint admits, denies and alleges as follows:

I.

Admits each and every allegation of paragraphs I, II and III.

II.

This answering defendant alleges that he has not knowledge or information sufficient to form a

belief as to the truth of the allegation in paragraph IV that the net income of the defendant Boss & Peake Automobile Company from January 1st, 1917, to June 1st, 1917, was the sum of \$22,549.94, and therefore denies the same; and upon the same grounds and for the same reason this answering defendant denies that the said corporation was liable to pay a tax of \$12,405.30 or any part thereof.

### III.

Answering paragraph V this answering defendant admits that he has not paid any part of said sum of \$12,405.30, and alleges that he has no knowledge or information sufficient to form a belief as to whether either of the other defendants have paid all or any part of said sum, and therefore denies that either of the other defendants [23] has not paid said sum or any part thereof, and this answering defendant further denies that there is now due and owing to plaintiff the sum of \$6,202.65 or any part thereof.

### IV.

Denies that the defendant corporation was dissolved during the month of June, 1917, and denies that any part of the assets of said corporation were distributed to or were received by this defendant E. W. A. Peake.

### V.

Denies that any part or portion of the assets of the defendant corporation were distributed to or were received by this answering defendant, and this answering defendant alleges that he has not knowledge or information sufficient to form a belief

and therefore denies that the Boss & Peake Automobile Company is without sufficient assets from which plaintiff could collect such taxes as may be legally due it.

VI.

Admits each and every allegation of paragraph VIII.

VII.

- Denies that any demand has been made upon this answering defendant for the payment of any sums of money whatsoever by the plaintiff.

WHEREFORE this answering defendant prays that so far as he is concerned the plaintiff take nothing by its suit and that he may have and recover of plaintiff his costs and disbursements herein incurred, and that he may have such other and further relief as may to the Court seem equitable and proper.

(Signed) WINTER & MAGUIRE,

(Signed) JOHN F. REILLY,

Solicitors for Defendant E. W. A. Peake. [24]

United States of America,

District of Oregon,—ss.

I, E. W. A. Peake, being first duly sworn on oath, depose and say that I am one of the defendants in the above-entitled suit; that I have read the foregoing answer and know the contents thereof, and that the same is true except as to matters therein stated on information and belief and as to those matters I believe them true.

(Signed) E. W. A. PEAKE.

Subscribed and sworn to before me this 6 day of February, 1922.

[Notarial Seal] (Signed) JOHN F. REILLY,  
Notary Public for Oregon.

My commission expires 6/16/22.

State of Oregon,  
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this — day of February, 1922, by receiving a copy thereof, duly certified to as such by John F. Reilly, attorney for defendant E. W. A. Peake.

(Signed) LESTER W. HUMPHREYS,  
Attorney for Plaintiff.

(Signed) JOHN F. LOGAN,  
By F. O'CONNELL,  
Atty. for C. L. Boss and Boss & Peake Automobile  
Co.

Filed Feb. 6, 1922. G. H. Marsh, Clerk. [25]

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AND AFTERWARDS, to wit, on the 6th day of February, 1922, there was duly filed in said Court an answer of E. W. A. Peake to cross-bill of Boss & Peake Automobile Company and C. L. Boss, in words and figures as follows, to wit: [26]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,  
Defendants.

**Answer of E. W. A. Peake to Cross-bill of Boss &  
Peake Automobile Company and C. L. Boss.**

Comes now the defendant E. W. A. Peake by  
Messrs. John F. Reilly and Winter & Maguire, his  
solicitors of record, and for answer to the cross-  
bill of the defendants Boss & Peake Automobile  
Company and C. L. Boss admits, denies and al-  
leges as follows:

I.

Admits each and every allegation of paragraphs  
I and II.

II.

Admits that the defendant corporation continued  
in operation from November 25th, 1916, until long  
after June 1st, 1917, and denies that said corpora-  
tion stopped operations on June 1st, 1917; admits  
that at the time of the organization of said corpora-  
tion the capital stock thereof was divided so that  
the defendant C. L. Boss owned 149 shares and  
the defendant E. W. A. Peake owned 149 shares,

and that two shares stood in the name of W. H. Bietau; admits that in March, 1917, the two shares standing in the name of W. H. Bietau were divided, so that one share thereof stood in the name of R. E. Murphy, but denies that said stock or any part thereof remained in the name of or was owned by E. W. A. Peake or W. H. Bietau during the whole life of said corporation, and alleges that on and after June 1st, 1917, the said stock was thereafter owned and purchased by defendant C. L. Boss. [27]

### III.

Denies that at the outbreak of the great war of 1917 or at any time between the first day of January, 1917, and the first day of June of said year this defendant became alarmed as to the future of the automobile business and particularly as to the financial market condition of said business, and denies that thereafter and particularly after the month of March, 1917, this defendant sought to bring about a dissolution or liquidation of the said defendant corporation, the Boss & Peake Automobile Company, and further denies that the business affairs of said corporation were conducted in such a way after January 1st, 1917, that either of the defendants C. L. Boss and E. W. A. Peake could tell at any time what the value of its assets or what its earnings were, and denies specifically that satisfactory or other estimated statements were continuously or at all brought down to date showing costs, overhead charges and satisfactory or otherwise estimated profits, or any one or more of said



items, and denies that after the declaration of war by the United States this defendant viewed or continued to view with alarm the future or proposed the dissolution of said defendant corporation Boss & Peake Automobile Company by the division of the property thereof between this defendant and the defendant C. L. Boss share and share alike or in any other manner whatsoever.

IV.

Denies that on the 23d day of May, 1917, or at all the defendant E. W. A. Peake made definite or other proposals to divide the property of the defendant corporation according to his 50 per cent interest by taking one-half or over one-half of the properties in kind or money's worth, or upon any other basis or division whatsoever; denies that on the 31st day of May, 1917, or at all, the properties or assets of said defendant corporation Boss & Peake Automobile Company were by agreement or otherwise divided between the defendant C. L. Boss and defendant E. W. A. Peake, and further denies that it was then and [28] there or at all agreed that the defendant corporation Boss & Peake Automobile Company should at once be dissolved.

V.

This answering defendant has not knowledge or information sufficient to form a belief, and therefore denies that on June 1st, 1917, that a copartnership was formed between the defendant C. L. Boss and R. J. McRell known and designated as the C. L. Boss Automobile Company, and denies that the defendant Boss & Peake Automobile Com-

pany was dissolved and ceased to do business from the month of June, 1917, but admits that said corporation was dissolved and ceased to do business on July 17th, 1917, and denies that on the 1st day of June, 1917, or at all, the defendant E. W. A. Peake received his 50 per cent or other interest of the property and assets of the said defendant corporation in property, money and securities amounting to \$26,083.65 or at all, or any other sum, and denies that on the 1st day of June, 1917, or at all during the month of June, 1917, this defendant recognized the existence of the copartnership C. L. Boss Automobile Company by dealing with it or receiving contracts and assurances from it or by dealing with it as a new firm or by dealing with it as the successor of the defendant corporation Boss & Peake Automobile Company, or at all; denies that this defendant on June 1st, 1917, or at all, loaned money to said copartnership C. L. Boss Automobile Company and or took from said copartnership as security for any loan automobiles theretofore and prior to the 31st day of May, 1917, the property of the defendant corporation Boss & Peake Automobile Company.

## VI.

Admits that on the 22d day of June, 1917, a resolution was adopted by the stockholders of the defendant Boss & Peake Automobile Company and that on July 17th, 1917, a certificate of dissolution was issued out of and under the seal of the Corporation Commissioner of the State of Oregon, and denies that the Boss & Peake Automobile [29]



Company was dissolved in accordance with any agreement between the defendant C. L. Boss and this defendant, and denies that said corporation ceased doing business as a going concern on the 1st day of June, 1917, or at any time prior to the 17th day of July, 1917.

## VII.

This answering defendant has not knowledge or information sufficient to form a belief, and therefore denies that from and after the 1st day of June, 1917 a copartnership known and designated as the C. L. Boss Automobile Company did business as a copartnership and a separate business entity, and denies that the said copartnership from and after the first day of June, 1917, made a return to the Government of the United States under the Revenue Act of 1917, and denies that ever since said date the said copartnership made returns to the Government of the United States of its activities as such copartnership, and that the proper officers of the United States have ever since the 1st day of June, 1917, made audit of said copartnership, and denies that the Boss & Peake Automobile Company on June 1st, 1917, was succeeded on said date by the said C. L. Boss Automobile Company.

## VIII.

Denies that the defendant E. W. A. Peake or at all on June 1st, 1917, did business with the said copartnership C. L. Boss Automobile Company; denies that this defendant knew on June 1st, 1917, that the said copartnership C. L. Boss Automobile Company was to start in business at the liquidation

of defendant corporation Boss & Peake Automobile Company on June 1st, 1917; and denies that on the 1st day of June, 1917, this defendant recognized the nonexistence of the defendant corporation Boss & Peake Automobile Company by accepting the notes of the copartnership C. L. Boss Automobile Company or at all.

### IX.

Admits that this defendant on June 1st, 1917, did not have in contemplation the passage of the Revenue Act of 1917, and that [30] this defendant did not contemplate the retroactive effect of any such revenue act; denies that the defendant C. L. Boss did not have notice and knowledge of the defendant corporation and of C. L. Boss as the distributee of the assets and property thereof until he was advised thereof by the property authorities of the United States Government; and denies that the defendant C. L. Boss tendered to the Government one-half of the sum of \$12,405.30 or any part thereof; and this answering defendant has not knowledge or information sufficient to form a belief and therefore denies that any payment was made by the defendant C. L. Boss to the Government of the United States under the Revenue Act of 1917 upon claims that the said C. L. Boss was responsible as owner of one-half of the physical properties of said corporation or on any other basis, and denies that any part or portion of any income tax of said corporation for the year 1917 with any interest or penalty thereto should be legally or properly chargeable to this answering defendant.

And for a further and separate answer to the cross-bill of the defendants C. L. Boss and Boss & Peake Automobile Company this answering defendant alleges as follows:

I.

That on and prior to the 31st day of May, 1917, this answering defendant was the owner of one-half of the capital stock of the defendant Boss & Peake Automobile Company; that on the 1st day of June, 1917, this defendant sold all of his capital stock in said corporation to the defendant C. L. Boss, and that from and after the 1st day of June, 1917, this defendant has had no interest in said capital stock or in the assets or physical properties of said corporation, and that on the 1st day of June, 1917, the capital stock of this defendant was transferred from his name to C. L. Boss and divers other persons to this defendant unknown but at the instance of the said defendant C. L. Boss. [31]

WHEREFORE, having fully answered the cross-bill of the defendants C. L. Boss and Boss & Peake Automobile Company, this answering defendant prays that they take nothing by their cross-bill and that the defendant C. L. Boss and the defendant Boss & Peake Automobile Company and the plaintiff United States of America take no decree against this answering defendant, and that this Court decree that any tax which may be found due and payable to the plaintiff from the defendant corporation be paid by the defendant C. L. Boss and by said corporation, and that this answering defendant have and recover of the defendants C. L. Boss and Boss & Peake Automobile Company his costs and

disbursements herein incurred, and that he have such other and further relief in the premises as may to the Court seem equitable and proper.

(Signed) WINTER & MAGUIRE,

(Signed) JOHN F. REILLY,

Solicitors for Defendant E. W. A. Peake.

State of Oregon,

County of Multnomah,—ss.

I, E. W. A. Peake, being first duly sworn, depose and say that I am one of the defendants in the above-entitled suit; and that the foregoing answer to cross-bill is true as I verily believe.

(Signed) E. W. A. PEAKE.

Subscribed and sworn to before me this 6th day of February, 1922.

[Notarial Seal] (Signed) JOHN F. REILLY.

Notary Public for the State of Oregon.

My commission expires 6/16/22.

State of Oregon,

County of Multnomah,—ss.

Due service of the within answer of defendant E. W. A. Peake [32] to cross-bill is hereby accepted in Multnomah County, Oregon, this — day of February, 1922, by receiving a copy thereof, duly certified to as such by John F. Reilly, attorney for Defendant E. W. A. Peake.

(Signed) LESTER W. HUMPHREYS,

Attorney for Plaintiff.

(Signed) JOHN F. LOGAN,

By FLORA O'CONNELL,

Atty. for C. L. Boss and Boss & Peake Automobile Co.

Filed Feb. 6, 1922. G. H. Marsh, Clerk. [33]

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AND AFTERWARDS, to wit, on the 22d day of May, 1922, there was duly filed in said court a reply of defendants Boss & Peake Automobile Company and C. L. Boss to answer of E. W. A. Peake to cross-bill, in words and figures as follows, to wit: [34]

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In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Reply of Boss & Peake Automobile Company and  
C. L. Boss to Answer of E. W. A. Peake to  
Cross-bill.**

Come now the defendants Boss & Peake Automobile Company and C. L. Boss, individually, and replying to the new matter in the further and separate answer to the cross-bill of these defendants, admit, deny and allege as follows, to wit:



## I.

Admit that on and prior to the 31st day of May, 1917, the defendant E. W. A. Peake was the owner of one-half of the capital stock of the defendant Boss & Peake Automobile Company; deny that on the 1st day of June, 1917, the said defendant E. W. A. Peake sold all his capital stock in said corporation to the defendant C. L. Boss or that after the 1st day of June, 1917, the said E. W. A. Peake had no interest in said capital stock or in the assets or physical properties of said corporation or that on the 1st day of June, 1917, the capital stock of said defendant E. W. A. Peake was transferred from his name to C. L. Boss or divers other persons, save and except as the transfer of said capital stock was involved in the division of the physical assets of said corporation as set out in the cross-bill of the defendants Boss & Peake Automobile Company and C. L. Boss. [35]

WHEREFORE these replying defendants, having fully replied to the separate answer and defense of the defendant E. W. A. Peake, pray for the relief prayed for in the cross-bill.

JOHN F. LOGAN,  
Attorney for Defendants Boss & Peake Automobile  
Company and C. L. Boss.

State of Oregon,  
County of Multnomah,—ss.

I, C. L. Boss, being first duly sworn, say that I am one of the defendants in the within entitled



cause, and that the foregoing reply is true as I verily believe.

C. L. BOSS.

Subscribed and sworn to before me this 8th day of February, 1922.

[Seal]

JOHN F. LOGAN,  
Notary Public for Oregon.

My commission expires 5 Dec. 1923.

Service admitted Portland, Ore., Feb., 1922.

JOHN F. REILLY,  
Of Attys. for E. W. A. Peake.

Filed May 22, 1922. G. H. Marsh, Clerk. [36]

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AND AFTERWARDS, to wit, on the 11th day of December, 1922, there was duly filed in said court an opinion, in words and figures as follows, to wit: [37]

In the District Court of the United States for the District of Oregon.

No. L—8786.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Opinion.**

December 11, 1922.

LESTER W. HUMPHREYS, U. S. Attorney;

CARL A. MAPES, Solicitor of Internal Revenue,  
C. A. GWINN, Attorney, Treasury Department,  
of Counsel;

JOHN F. LOGAN and ISHAM N. SMITH, for Defendant Boss;

WINTER & MAGUIRE and JOHN F. REILLY,  
for Defendant Peake.

WOLVERTON, District Judge:

This is a suit in behalf of the General Government to recover one-half of the income tax assessed against the defendants Boss and Peake, as the shareholders in equal division of the Boss & Peake Automobile Company, a dissolved corporation. One-half of the tax, namely, \$6,202.65, has been paid by the defendant Boss, and the other half remains due and unpaid. Boss, while not denying liability, claims that he has paid his full share of the tax, and that Peake should be required to pay the amount remaining due. Peake denies liability, on the ground that he was not a stockholder at the time of dissolution of the corporation; claiming that prior to dissolution he sold his entire stock to Boss, and that therefore Boss, being the owner of all the stock, should respond in payment of the entire tax.

[38]

The cause can be disposed of with greater clarity by first ascertaining whether, as between Boss and Peake, the latter is liable; and, second, as between Peake and the Government, whether he is liable with Boss for the payment of the tax.

The Boss & Peake Automobile Company was organized and incorporated on November 8, 1916, with a capital stock of \$30,000, divided into 300 shares of \$100 each. Of these shares Boss subscribed 149, Peake 149, and W. H. Bietau 2. Subsequently Bietau assigned one of her shares to R. E. Murphy. Bietau was the secretary of Peake, and Murphy became the bookkeeper for the corporation. These two were, however, mere holding stockholders, for giving voice at the meetings of stockholders and directors; the real ownership being in Boss, 1 share, and Peake, 1 share. In reality, Boss and Peake were equal owners of the capital stock, each owning 150 shares, and each having paid into the concern as capital investment the full par value of his stock.

The corporation at once entered upon the business for which it was organized, and so continued to June 1, 1917, when, or shortly thereafter, its assets were taken over by C. L. Boss Automobile Company. An income tax of \$12,405.30 was levied upon the earnings of the company from January 1 to June 1, 1917; the earnings being appraised at \$22,549.94.

On or about May 21, 1917, Boss and Peake had an understanding between them, by which Peake was to dispose of his interest in the corporation to

Boss, and the crucial inquiry as between them is, whether the agreement was for a sale of Peake's stock to Boss, or for a dissolution of the corporation and a division of the assets of the concern. [39]

Peake maintains that it was for a sale, pure and simple, and Boss that it was for a dissolution, with division of the assets.

The parties were business men, were keenly alive to the promotion of the enterprise, and kept fairly in mind the probable earnings of their investment as the business proceeded. In their relative lines of work, Boss was concerned more in the purchase of cars from the manufacturers and the disposal of them in the field, and Peake with the arrangement of finances with which to conduct the business. Boss asserts that the matter of dissolution and division of assets was early a subject of discussion, and even at the time of forming the corporation, and that it was understood that the investments should be so managed and the business so ordered that such a settlement could at any time be readily arrived at; that in March, 1917, Peake made an offer to sell his stock, which was accepted by him (Boss), and that a paper was drawn up for effectuating the sale, but that Peake declined to sign it. The paper alluded to is in evidence, and is in the nature of an option for the sale of the stock upon an inventory basis; Boss to pay Peake 50 per cent of the inventory value of the assets.

Boss further testifies that he and Peake had a conversation at the central depot in Portland rela-

tive to a dissolution of the corporation, and a distribution of the assets between them. McCornack, the field manager of the Hudson Motor Car Company, had been in the city a short time, and had been in communication with Boss, but not with Peake. Boss and Peake were in rivalry as to which of them should be favored in getting the agency for handling the Hudson car. McCornack was about to leave the city, and had gone to the depot to take the train. Boss and McRell were with him. Peake, learning that McCornack was leaving, went to the depot [40] to see him, and there had a short conversation with him, in which McCornack gave him to understand that he preferred to deal with Boss. Boss further relates that, immediately upon McCornack's taking the train, he (Boss) turned to Peake and remarked that "he was blocking our distribution, our dissolution and distribution again, \* \* \* by taking the cash of the corporation and putting it in notes that the bank was carrying"; that thereupon Peake said to him, "I will take notes title notes on all the new Hudson cars, so that the distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation, and sell them to you boys, and take the title note, and loan you boys the money on the very automobiles, so that the dissolution and distribution can be completed. \* \* \* In doing so I must have my salary, I must have my capital, and I must have my net profit, which I estimate—the net profit I estimate to be \$20,000," after allowing over \$2,000 for profit and loss on the



notes that were indorsed, the service on the cars that were out, and the incidental bills that were not in; and that this proposition as made by Peake was accepted by him (Boss), to take effect as of June 1st. This was May 21, 22 or 23. Boss further explains that, before meeting at the depot, the record was brought up, and showed a little over \$22,000 profit, and that, after deducting the profit and loss on accounts unsettled, would leave approximately \$20,000, one-half of which, namely, \$10,000, would be Peake's share of the net profits, and that the amount claimed by Peake totaled \$26,137, which included some chairs and a desk which belonged to him, individually. Further on, Boss says that "There was no capital stock ever sold. The capital stock was indorsed, at my request, as a means or a way. When we were down there, he made a proposition of dissolving and distributing, either in cash or kind, and his [41] proposition was accepted"; that in the transfer, he (Boss) was to take the liabilities, but that as to the tax liability, he did not assume that, because it was not known, and was not a current liability.

R. J. McRell testified, respecting the conversation at the depot, that "Mr. Boss turned to Mr. Peake, and said that he was blocking the dissolution of the Boss & Peake Automobile Company, and Mr. Peake asked him how that was. And he said that he had taken the money of the corporation and had put it into automobile notes; in other words, had used up the funds. \* \* \* And Mr. Peake came back at him very quickly, and said that he would take the



notes of the C. L. Boss Automobile Company; that is, he would loan money to the C. L. Boss Automobile Company, and take the new automobiles that was controlled by the Boss & Peake Automobile Company \* \* \* as security for the loan,—as I recall, there were eight automobiles,—these eight Hudson automobiles, to apply on this loan. And he said that he must have his salary in the deal, and he must have his capital, and he must have his profit. \* \* \* They estimated, as I recall, their profits at \$20,000; and the division of the two, of course, would be \$10,000, divided between the two, that would be the division of profits”; that Boss accepted the proposition “very quickly right there,” and that on June 1st, at the First National Bank, the deal was completed.

This is Boss’ rendition of the nature of the agreement growing out of the conversation at the depot.

Peake testifies, touching the transaction there had, that, before McCornack had departed, he called Boss off to one side, away from both McCornack and McRell, so they could talk privately; and “I asked—Mr. Boss’ intention was to make me a [42] proposition to go out on July 1st; and I asked Mr. Boss if he would be able to get his money together by June 1st. He said he would. Well, I says, ‘I will make you a price then. I will make you a price of \$25,000 for the stock,’ and I would expect the salary credit to be paid. Mr. Boss says, ‘That is perfectly satisfactory.’ And we left at that, and that was all the conversation, and it didn’t

take any longer than I have taken in telling you now. \* \* \* Absolutely nothing said about any adjustments of any kind. \* \* \* The first I heard of an adjustment account was here.”

Speaking of the earlier conversation, in March, alluded to by Boss, Peake says that he made no offer to sell to Boss on an inventory basis; that his proposition was to sell his stock in the company, and that he always expected to sell for a lump sum; that he assigned his stock in blank to Boss; that he at no time insisted or requested that the corporation be dissolved, and that he “really didn’t know” that the corporation had been dissolved until the tax question arose in the summer of 1920.

This fairly presents the contentions of the parties respecting the nature of the transaction had between them at the depot. They differ radically, and the question must be determined upon the nature of their dealings subsequently and the manner in which the final adjustment was made.

On May 31, 1917, Peake tendered to the board of directors and stockholders of the Boss & Peake Automobile Company his resignation as secretary and treasurer and director of such company. On the same day, at a stockholders’ meeting, at which were present C. L. Boss, representing 298 shares, R. J. McRell, 1 share, and R. E. Murphy, 1 share, his resignation was accepted, and McRell was elected director in his stead.

On June 1, 1917, Boss and McRell filed with the county clerk and *ex-officio* recorder of Multnomah County a certificate [43] declaring that they had

entered into copartnership under the assumed name of C. L. Boss Automobile Co.

A bill of sale was executed by the Boss & Peake Automobile Company, through its president, C. L. Boss, and R. J. McRell, Secretary, purporting to sell, assign and convey all the property of the corporation to the C. L. Boss Automobile Company. The paper is without date, but it purports to have been acknowledged on July 3, 1917. At a meeting of stockholders held June 22, 1917, this bill of sale was ratified, as were all the acts and doings of Boss and McRell, individually and as officers of the corporation. At this meeting the corporation was declared to be dissolved.

The transactions which closed the agreement of May 21st took place on June 1, 1917, at the First National Bank, in Portland. The C. L. Boss Automobile Company gave to Peake eight notes, each for the sum of \$1,200, and each secured by a Hudson automobile, as per contracts which were subjoined to the notes. Thereupon Peake gave his check to the C. L. Boss Automobile Company for \$9,600, which was delivered to Boss. Boss thereupon deposited the same in the bank to his account, together with \$8,000 which he had borrowed from The Western Bond & Mortgage Co., and the further sum of \$8,537.15, which he obtained from the Boss & Peake Automobile Company on his note, making in all \$26,137.15. Boss then gave Peake his check on the bank for that amount, and Peake assigned his stock, 149 shares, to Boss, and W. H. Bietau assigned 1 share to R. J. McRell, all in blank, and

these were delivered to Boss. Thus all matters between Boss and Peake were settled and closed. Thenceforth Peake held the notes of the C. L. Boss Automobile Company in the sum of \$9,600, secured as has been indicated. These notes were subsequently paid, as the cars were disposed of, presumably by the C. L. Boss Automobile Co. [44]

The books and records of the Boss & Peake Automobile Company show that on June 1st the company gave to C. L. Boss its check for \$8,537.15. This was one of the checks deposited in the bank to the account of Boss, to enable him to draw the check of \$26,137.15 to the order of Peake. The book entries in the combined cash and journal show the following:

"E. W. A. Peake, Cap. a/c.....\$15,000.00		
Do	Sal'y a/c.....	1079.17
Do for Mah'y Desk & Chairs.....		57.98
Do as earnings 11/25 to 5/31....	10,000.00	
C. L. Boss, by check, Cap. a/c..	26,137.15."	

In the journal is found this entry:

"Profit & L.....	10,000.00
Do .....	11,373.32

Interest per agreement:

E. W. A. Peake.....	10,000.00
C. L. Boss 1/2 profits.....	11,373.32."

The evidence shows that a balance of \$1,373.32 was passed to surplus account. It is further shown that the profits of the company on June 1st were \$22,746.64. This does not seem to be controverted.

These records, it is shown by Murphy, the bookkeeper, were not written up and posted until about the 19th day of June, but they were designed to record the transactions of the date of June 1st; the bookkeeper being unable, for lack of time, to insert the entries at the time the transactions took place.

Other entries that throw some light upon the subject of controversy are: One in the ledger showing that the surplus account of \$1,373.32 was passed, to C. L. Boss \$996.21, and to R. J. McRell \$377.11. And two in the combined cash and journal, of date June 19, 1917, the first a charge "Clearing a/c \$4223.91," evidenced by check No. 2804; and the second, "Clearing a/c Tr. from B. & P. A. Co. to C. L. B. & Co. \$4223.91." [45]

The books of the Boss & Peake Automobile Company were not closed on June 1st, but were used by the C. L. Boss Automobile Co., and carried on as though there had been no suspension of business on the part of the corporation.

As to the item of \$22,746.64, representing the profits of the corporation, Mr. Boss says it was "divided and held in abeyance to find out how much interest McRell would take in the business." And as to the surplus of \$1373.32, he says it was "credited to ourselves (meaning himself and McRell), because ourselves would absorb in the going busi-



ness according to our percentages." He had reference to the percentages of capital each was to have in the copartnership.

Boss further testifies that Peake had nothing to do with the business of the new company after he sold out, "after he took his distribution."

Peake testifies that he never requested that the corporation be dissolved, and had nothing to do with the organization of the C. L. Boss Automobile Company, and never had any interest in it.

The evidence is too long and the books too prolix to attempt a particular analysis thereof. But, from what has been noted, we have a fairly accurate basis from which to formulate our conclusion touching the nature of the agreement or understanding of the parties, had at the depot and subsequently brought to a close by the culmination at the bank.

Boss and McRell agree in all material particulars as to the understanding reached at the depot. Peake discloses an entirely different arrangement. Standing alone, and according to the witnesses' full credibility, Boss would have the preponderance of the evidence in his favor. But the conversation at the depot is not all there [46] is in the record to explain the transaction. The agreement culminated at the bank. We have in what took place there physical facts, which in their evidentiary character are potent, and scarcely to be disputed. In short, Boss assembled his funds and placed them in the bank to his credit, so that he could draw against them. Thereupon he drew his check to the order of Peake, and delivered it to him. At the



same time, Peake's stock was assigned in accordance with their understanding, and thus the transaction was closed. Concretely, this was a culmination of the entire agreement. Nothing whatsoever was reserved respecting a dissolution of the corporation. Boss had acquired the stock, and, he being the owner of the other half of the stock, the corporation was in his hands, to do as he liked with it,—to dissolve it, and wind out the business in which it had been engaged, or to continue it as a going concern.

In this connection, it should be recalled that the records show that Peake tendered his resignation as secretary, treasurer and director of the Boss & Peake Automobile Company on May 31st, to take effect as of that date. This was accepted on the same day, at a stockholders' meeting, in which Boss represented 298 shares of stock, and McRell was elected a director in Peake's stead.

Peake may have known, and must have known, that Boss and McRell intended forming a copartnership and taking over the assets of the corporation; but in this he was not concerned. He loaned the copartnership \$9,600, and accepted its paper, taking certain automobiles as security. This was to enable Boss to assemble the fund with which to pay him. Boss drew against the amount, when he drew his check to the order of Peake, in payment of the purchase price of the stock. [47]

It is doubtful whether, at the exact time of the transaction at the bank, the certificate had been executed designating the name and style of the

copartnership, for Boss and McRell both testify that they repaired immediately to the office of Mr. Logan for the purpose of having that done. That is of minor importance, however, as it is not disputed that they had previously agreed between themselves to enter into such relations.

Much has been said in the testimony respecting numerous satisfactory estimated statements, which Boss claims were made from time to time, which enabled the parties to ascertain as the business progressed very closely what profits had accumulated. Peake denies that such statements of the business were frequently made, or at all. In this he is supported by Murphy, the bookkeeper. The dispute, however, is of little importance, as Peake does not deny that he kept himself fairly well posted touching the accumulation of profits during the pendency of the business of the company. This enabled him in his estimate to put a satisfactory price on his stock.

What we have of the books consists in a measure of trial balances. There was never any inventory of the assets made, and, of course, Peake never had any knowledge of such, nor any hand or part in it. The process of dissolution was simply for the C. L. Boss Automobile Company to take over the business and assets of the Boss & Peake Automobile Company, in which Peake, having resigned as director and assigned his stock to Boss, had no part. The whole proceeding was thenceforth directed by Boss and McRell. The Boss & Peake Automobile Company, through Boss, its president, and McRell,

its secretary, passed all of its property by bill of sale to the C. L. Boss Automobile Company, a co-partnership; but the business of the corporation was not closed until about the 19th day of June, [48] 1917, nor was the corporation finally dissolved until the 22d.

Referring to the affidavits of Boss and McRell, made at the time the tax was assessed, it will become apparent that Boss then had a somewhat different theory of the supposed division of the assets between himself and Peake; the theory being that there was an equal division of the entire assets of the corporation. McRell concretely states what was then done, from Boss' standpoint, as follows:

“That on said 1st day of June, 1917, a division of the physical assets of said Boss & Peake Automobile Company, a corporation, was had and made by ascertaining from the periodical statement, kept and maintained by said corporation, of the value of all the physical assets, including accounts and estimated profits, and by such division E. W. A. Peake received in cash the full sum of \$26,137.15, which was one-half of the value of said assets, as above set out, together with the value of a certain desk owned privately by E. W. A. Peake and valued at \$53.50; in other words, E. W. A. Peake received one-half of \$52,167.30, which was \$26,083.65, plus \$53.50, making \$26,137.15.”

Boss says, speaking of the alleged agreement of May 21st, that the assets “were to be divided 50 per cent going to myself and 50 per cent going to

Mr. Peake." His testimony now shows that the total assets of the corporation were, on June 1st, \$52,746.64, of which \$22,746.64 was carried in the profit and loss account; that \$10,000 of this amount was paid to Peake, \$11,373.32 credited to himself, and \$1,373.32 passed to surplus account and subsequently divided between himself and McRell, according to their several interests in the copartnership. So that there could not have been a physical division of assets, as asserted by Boss and McRell in their affidavits addressed to the revenue officers. Nor was there an equal division of such assets. There was never an inventory made up of the entire assets, brought down to the date of the culmination of the transaction, and the parties did not deal with reference thereto when they closed their negotiations. This change of position by Boss and McRell is of significance in weighing [49] the testimony *pro* and *con* touching the controversy, and in determining what was the real agreement of the parties.

The income tax was not assessed against the corporation until May 1, 1920. Peake had no knowledge of it until he received information thereof from the office of the Collector of Internal Revenue. The tax is referable in small measure to the act of September 8, 1916 (39 Stat. 756), but by far the greater proportion to the act of October 3, 1917 (40 Stat. 300). The later act, although passed subsequent to the time the business was conducted by the Boss & Peake Automobile Company, is retroactive in its effect. It is claimed by Boss that, at the

time of the transaction between him and Peake, the tax was not in their minds, and that therefore it did not enter as an element in their agreement; that only the current liabilities were assumed by him. Some of the tax, however, was assessable against the property; that is, under the act of September, 8, 1916. The parties were presumed to know of this, and, of course, they were required to take notice of the power of Congress to enact a retroactive measure of the kind denoted by the act of October 3, 1917.

It is a matter of moment, also, that the stock had a value beyond the mere book value of the assets of the corporation. The enterprise had proven to be profitable. On an investment of \$30,000, the company had earned more than \$22,000 in five months, and the goodwill must have been of considerable worth. Peake gave up his interest in this when he parted with his stock.

Considering all the testimony, and the manner in which the parties have treated the subject matter of their adjustment, [50] I am impelled to the conclusion that the agreement consisted in the sale by Peake of his capital stock in the Boss & Peake Automobile Company to Boss for the lump consideration of \$25,000; it being understood that Peake should be paid the salary due him, and compensation for the furniture which was his individual property; and that it was not for a dissolution of the corporation and a division and distribution of its physical assets between them. As between Boss and Peake, therefore, the former is liable for the



entire tax, and the latter should not be held accountable for any of it.

Now, as to Peake's liability to the Government, it is not questioned that the United States may sue, as it has done, for the tax.

The tax provision of the act of October 3, 1917, is retrospective as of January 1, 1917, but the act is not unconstitutional because of that provision.

Brushaber vs. Union Pacific Railroad Company,  
240 U. S. 1.

As is said in Brady vs. Anderson, 240 Fed. 665, 667:

"The tax is against the citizens and residents of the United States personally. They are chargeable in respect to income received by them. The statement that the tax is upon this income does not create an obligation *in rem*. It is only a way of saying that the owner is taxable with reference to the income."

So is a corporation chargeable with the tax, as a person is charged, although the tax is upon its income.

The Government bases its remedy against Peake upon the hypothesis that he was a stockholder in the Boss & Peake Automobile Company when and at the time it was dissolved, and that he came into possession of a portion of its property in the way of distribution sufficient in value to pay the remainder of the tax due, [51] and therefore that he is liable. In other words, it is argued that Boss and Peake received the then existing assets of the corporation, and that it is immaterial to the Gov-



ernment as to what form the distribution took, so long as the assets of the corporation were actually depleted by the stockholders, whether Peake received his portion in form as part of the purchase price of his stock or as a distribution of the assets.

It must be conceded that where, upon the dissolution of a corporation, its assets are distributed among the stockholders, the stockholders become liable to the creditors of the corporation at least to the extent of the property received by them. This is referable to the so-called trust doctrine.

As we have seen, Peake sold his stock to Boss. Having the stock, the Boss & Peake Automobile Company, through Boss, as president, and McRell, to whom was assigned one share of stock as secretary, by bill of sale, sold and transferred the entire assets of the corporation to the C. L. Boss Automobile Company. The sale was in due time ratified by the stockholders, Boss representing 298 shares of the stock at the time. In all this, Peake had no part. Availing themselves of the corporation assets, Boss and McRell were enabled to, and did, organize the C. L. Boss Automobile Company, a copartnership; Boss giving to McRell such interest only as McRell was able to purchase and pay for. The copartnership having been organized and established as an entity capable of holding the assets of the corporation transferred to it, Boss and McRell were so equipped that they thereupon, through the usual formalities, dissolved the corporation at a time when it possessed no assets for distribution. Again, in neither the formation of the

copartnership nor the dissolution of the corporation did Peake have a hand. The logical sequence was that Boss acquired all the assets [52] of the corporation, and utilized them as his capital in the copartnership, and this by reason of the fact that he had acquired Peake's stock. Otherwise, he could not have accomplished his purpose, simply because Peake would not have allowed it.

Applying the trust doctrine, it would follow that Boss, and not Peake, would be liable for the debts of the corporation, and with them the tax in question. Aside from this, it must be borne in mind that Boss assumed the liabilities, and Peake was to be relieved of them.

In *Pierce vs. United States*, 255 U. S. 398, the Waters Pierce Oil Company sold and transferred all its property to the Pierce Oil Corporation, and the proceeds were distributed among three stockholders. Suit was instituted against the Waters Pierce Oil Company and the three stockholders for the amount of a sentence imposed against the Oil Company. The bill was dismissed as against the Oil Company, and the Government was awarded a decree against the stockholders.

In the case of *Martin vs. City of Lexington*, 210 S. W. 483, all the owners of stock in Curry, Brown & Snyder, a corporation, sold and delivered to E. L. Martin their shares of stock, which transaction he attempted to construe as a purchase of the assets. After the sale, Martin took charge of the business, and commingled his merchandise with that taken over. He was held liable for taxes assessed against

the corporation's stock of merchandise, in a suit to recover against him as a stockholder.

These cases are illustrative. Both proceeded under the trust doctrine for recovery; not otherwise. The Martin case is of marked analogy to the one at bar. Martin claimed to have purchased the assets, and not the stock, but the court held otherwise. [53]

It is said that Peake depleted the assets of the corporation, and that for this he is liable. What he did, so far as the record shows, was to loan the C. L. Boss Automobile Company \$9,600, and take as security for the payment thereof mortgages on certain cars, which were previously a part of the assets of the corporation. The money was advanced to the copartnership by check, and by it turned over to Boss, who utilized it in paying Peake in part. The copartnership was left, as we have seen, owing Peake the amount of the \$9,600. The result was that a part of the previous assets of the corporation, but now the property of the copartnership, was thus encumbered in favor of Peake. Another circumstance is that Boss borrowed \$8,537.15 from the corporation on his note, and with this paid Peake, in part, the consideration for which he sold his stock.

Whether this amounted to a depletion of the assets of the corporation may be questioned, even though the property had not passed to the copartnership. In the one case, the entity had the money, which was a lien upon the cars hypothecated; and in the other it had the note of Boss, the equivalent,

supposedly, of the money withdrawn from its coffers. But, however that may be, a mere depletion of assets, unless accompanied by fraud with the view of overreaching creditors, does not afford basis for an equitable action to recover against the party receiving the assets withdrawn. Dividends are paid out every day, which action in itself is a depletion of assets accumulated; yet no one thinks, when the corporation had gone into liquidation or insolvency, of suing to recover such dividends. So in the present case, unless the supposed depletion is referable to the so-called trust doctrine, which it manifestly is not, the Government cannot have remedy on that account. I was impressed at the trial that, Peake having received money which came from the corporation, sufficient to cover the tax due, he would [54] be rendered liable thereby; but, from the foregoing considerations, obviously this cannot be the rule.

The Government will have a decree against C. L. Boss for the amount of the tax due, with interest and penalty. The bill of complaint will be dismissed as to E. W. A. Peake, and the cross-bill of Boss & Peake Automobile Company and C. L. Boss against Peake will also be dismissed, with costs to Peake against Boss.

Filed Dec. 11, 1922. G. H. Marsh, Clerk. [55]

AND AFTERWARDS, to wit, on Friday, the 19th day of January, 1923, the same being the 64th judicial day of the regular November term of said Court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [56]

In the District Court of the United States for the  
District of Oregon.

No. L—8786.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY,  
a Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Decree.**

THIS CAUSE came on to be heard and having been argued by counsel and considered by the Court:

IT IS ORDERED, ADJUDGED and DECREED as follows, to wit:

That plaintiff have judgment against the defendant, Boss & Peake Automobile Company, a corporation, and C. L. Boss and each of them for the sum of \$6,202.65, with interest thereon at the rate of 1% per month from August 15, 1920, amounting to \$1,736.74, together with 5% penalty



on the said sum of \$6,202.65 amounting to \$310.13,\* and for the costs and disbursements of this suit.

IT IS FURTHER ORDERED AND DECREED that plaintiff take nothing from the defendant E. W. A. Peake, and that plaintiff's amended bill be dismissed as to the defendant E. W. A. Peake.

IT IS FURTHER ORDERED and DECREED that the defendant C. L. Boss take nothing from the defendant E. W. A. Peake, that the cross-bill of defendants Boss & Peake Automobile Company, a corporation and C. L. Boss against defendant E. W. A. Peake be dismissed; and that E. W. A. Peake recover from the defendant C. L. Boss his costs and disbursements herein.

Dated at Portland, Oregon, this 19th day of January, 1923.

(Signed) CHAS. E. WOLVERTON,  
District Judge.

Filed Jan. 19, 1923. G. H. Marsh, Clerk. [57]

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AND AFTERWARDS, to wit, on the 3d day of February, 1923, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [58]



In the District Court of the United States for the  
District of Oregon.

Case No. —.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Petition for Appeal and Order Allowing Same.**

To the Honorable CHARLES E. WOLVERTON,  
District Judge of the United States for the  
District of Oregon.

The above-named defendant, C. L. Boss, considering himself aggrieved by the decree entered in the above court on the 19th day of January, 1923, in the above cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and prays that an appeal be allowed and a citation issue as provided by law, and that a transcript of the record and proceedings upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that a proper order touching the security to be required in

order to perfect this appeal be made, and that upon the filing of a bond in such sum as shall be provided for in the order attached hereto, that an order of supersedeas be made herein and the filing of the bond acknowledged as a supersedeas.

Dated this 2d day of February, A. D. 1923.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for C. L. Boss. [59]

The foregoing petition is hereby granted and appeal is allowed in the above-entitled cause, and it is

ORDERED that the appellant, C. L. Boss, shall furnish an undertaking on the appeal in the sum of five hundred dollars (\$500.00) and shall furnish an additional obligation, either in the same or separate instrument or bond as the appeal, in the sum of nine thousand dollars (\$9,000.00), conditioned as a supersedeas bond, and that upon the filing of the bond for the appeal that such appeal be effected and upon the filing of the bond for supersedeas that execution on the decree be stayed until the further order of the court.

Dated this 2d day of February, A. D. 1923.

CHAS. E. WOLVERTON,  
Judge Who Tried said Cause.

Service of the foregoing petition for appeal and allowance admitted and a copy thereof received

this 3d day of February, 1923.

THOS. H. MAGUIRE,

Asst. U. S. Attorney,

Attorney for Plaintiff, United States of America.

JOHN F. LOGAN and

ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company,  
a Corporation.

JOHN F. REILLY and

WINTER and MAGUIRE,

Attorneys for E. W. A. Peake.

Filed February 3, 1923. G. H. Marsh, Clerk.

[60]

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AND AFTERWARDS, to wit, on the 3d day of  
February, 1923, there was duly filed in said  
court an assignment of errors, in words and  
figures as follows, to wit: [61]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Assignment of Errors.**

Comes now Charles L. Boss and files the follow-  
ing assignment of errors upon which he will rely

upon the prosecution of his appeal from the decree made by this Honorable Court on the — day of January, 1923, in the above-entitled cause:

I.

The Court erred in holding and deciding that Charles L. Boss was responsible to and should be decreed and was decreed to pay to the plaintiff the remaining unpaid portion of the tax involved in this controversy with interest and penalties, and in decreeing that the said Charles L. Boss be required to pay to the plaintiff any sum whatsoever of the amount involved herein.

II.

The Court erred in not holding and deciding that the defendant E. W. A. Peake was and is responsible to the plaintiff, and as between him and Charles L. Boss the said E. W. A. Peake was and is responsible and should be decreed to pay the remaining unpaid portion of the tax, with interest and penalties, involved in this case.

III.

The Court erred in not holding and deciding that Charles L. Boss should be absolved and freed from any and all claims of the Government involved in this controversy.

IV.

The Court erred in rendering decree against the said Charles L. Boss for any sum whatsoever and in not rendering decree against the said [62] E. W. A. Peake as prayed for in Boss' pleadings, upon the ground that the evidence introduced upon the trial entitled the plaintiff to recover from the said E. W. A. Peake and as between E. W. A.

Peake and Charles L. Boss entitled such recovery by plaintiff against E. W. A. Peake alone.

V.

The lower court committed error upon the whole record in holding that Charles L. Boss was not entitled to the relief sought for in his pleadings.

VI.

The lower court committed error upon the whole record in dismissing the bill as to the said E. W. A. Peake, and in holding and deciding that the transaction between Boss and Peake was a sale of Peake's stock to Boss and was not a dissolution and distribution agreement.

WHEREFORE, the said Charles L. Boss, defendant, prays that the decree and judgment of the District Court of the United States for the District of Oregon be reversed.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Charles L. Boss.

Service of the foregoing assignment of errors admitted and a copy thereof received this 3d day of February, 1923.

THOS. H. MAGUIRE,  
Asst. U. S. Attorney,  
Attorney for Plaintiff.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company.

JOHN F. REILLY,  
WINTER & MAGUIRE,  
Attorneys for E. W. A. Peake.

Filed February 3, 1923. G. H. Marsh, Clerk.  
[63]

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AND AFTERWARDS, to wit, on the 3d day of February, 1923, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit: [64]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff and Appellee,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation,

Defendant and Appellee,

C. L. BOSS,

Defendant and Appellant,  
and

E. W. A. PEAKE,

Defendant and Appellee.

**Bond on Appeal.**

WHEREAS, in the above court and cause on January 19, 1923, decree in favor of the United States, plaintiff, was duly given, made, rendered and entered against defendants Boss & Peake Automobile Company, a corporation, and C. L. Boss for the sum of eight thousand two hundred forty-nine dollars and fifty-two cents (\$8,249.52), together with interest and costs, and also in favor



of the above named E. W. A. Peake, defendant, dismissing the cross-complaint of C. L. Boss and awarding costs to said E. W. A. Peake, and said C. L. Boss is desirous of appealing and has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from such decree, and of giving an undertaking for costs, disbursements and damages on such appeal, therefore, in consideration of the premises and of such appeal, we, the undersigned, C. L. Boss as principal, and American Surety Company of New York, a corporation organized, created and existing under and by virtue of the laws of [65] the State of New York and authorized to do business in the State of Oregon, and to furnish appeal and stay bonds of the character herein given, as surety, do hereby acknowledge ourselves and our and each of our heirs, executors, administrators, successors in interest and assigns, jointly and severally, firmly bound unto the above-named plaintiff and appellee United States, and unto the above-named defendant and appellee E. W. A. Peake, and unto the above-named defendant and judgment debtor and appellee Boss & Peake Automobile Company, who refuses to join in this appeal, in the sum of five hundred dollars (\$500.00) lawful money of the United States.

Yet, upon this express condition, that if the above C. L. Boss, appellant, shall prosecute his said appeal to effect and answer all costs and damages, if he fail to make good his plea, then this

obligation to be void, otherwise to remain in full force and effect.

And, whereas, further, said C. L. Boss, appellant, is desirous of giving an undertaking for stay of proceedings in said decree appealed from pending said appeal.

NOW, THEREFORE, in consideration of the premises and of the stay of proceedings on said decree pending said appeal we, the undersigned, C. L. Boss as principal, and American Surety Company of New York, a corporation organized, created and existing under and by virtue of the laws of the State of New York and authorized to do business in the State of Oregon, and to furnish appeal and stay bonds of the character herein given, as surety, do further hereby acknowledge ourselves and our and each of our heirs, [66] executors, administrators, successors in interest and assigns, jointly and severally, firmly bound unto the above-named appellee United States, and unto said appellee E. W. A. Peake, and unto said appellee Boss & Peake Automobile Company, in the sum of nine thousand dollars (\$9,000.00), lawful money of the United States.

Yet, upon this express condition, that if the above-named appellant C. L. Boss shall prosecute his said appeal and shall pay unto said appellee the United States of America the full sum of said decree so appealed from, if said decree shall be wholly affirmed, or shall pay that part of the sum awarded by said decree as to which said decree shall be affirmed, if affirmed only in part, then this obligation be void, else to remain in full force.

WITNESS the hand and seal of the principal and appellant, C. L. Boss, and the name and corporate seal and signature of the duly appointed representatives of said American Surety Company of New York, at Portland, Oregon, this 2d day of February, 1923.

C. L. BOSS,  
Principal.

AMERICAN SURETY COMPANY OF  
NEW YORK.

By W. J. LYONS,  
Resident Vice-President,

Approved by  
W. J. LYONS,  
Resident Agent.

(Corporate Seal) Attest: W. A. KING,  
Resident Assistant, Secretary,  
Surety. [67]

Examined and approved.  
CHAS. E. WOLVERTON,  
Judge.

United States of America,  
District of Oregon,—ss.

Due, legal and timely service accepted of foregoing bond at Portland, Oregon, February 3, 1923.

THOS. H. MAGUIRE,  
Attorney for Pltff. U. S. A.

JOHN F. REILLY and  
WINTER & MAGUIRE,

Attorneys for E. W. A. Peake.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Co.

Filed February 3, 1923. G. H. Marsh, Clerk.  
[68]

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AND AFTERWARDS, to wit, on the 19th day of February, 1923, there was duly filed in said court a stipulation relative to statement of the evidence, in words and figures as follows, to wit: [69]

In the District Court of the United States for the  
District of Oregon.

Case No. —.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Stipulation Relative to Statement of Evidence.**

By reason of the numerous objections proposed by defendant E. W. A. Peake and plaintiff United States to the statement of the Evidence in narrative form presented by C. L. Boss and the Boss & Peake Automobile Company, and of the difficulty of correcting such narrative statement to clearly and precisely state the evidence, and the contentions of the parties, and also by reason of the extended examination of technical witnesses and

of the matters involved in this record, it has been found to be not practicable to reduce the testimony to a narrative form which will clearly and precisely state the different contentions of the respective parties, and therefore the parties, by counsel, have agreed, subject to the approval of the Court, as follows:

(1) That the entire stenographic transcript of the evidence and the proceedings at the trial which is now on file in this court may be settled, allowed and printed as the statement of the case on appeal;

(2) The respective parties reserve all rights not hereby expressly waived except that the appellees, [70] to wit, the United States and said E. W. A. Peake hereby expressly waive any rights they may have to attack the validity of the record on appeal or the appeal by reason of the printing of the entire stenographic transcript as above set forth in lieu of its narrative form.

Dated Portland, Oregon, this 19th day of February, 1923.

THOS. H. MAGUIRE,

Asst. Attorney for the United States.

WINTER & MAGUIRE,

JOHN F. REILLY,

Attorneys for E. W. A. Peake.

JOHN F. LOGAN,

ISHAM N. SMITH,

Attorneys for C. L. Boss and Boss & Peake Automobile Company.

Filed February 19, 1923. G. H. Marsh, Clerk.  
[71]

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AND AFTERWARDS, to wit, on the 19th day of February, 1923, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: [72]

In the District Court of the United States for the  
District of Oregon.

No. —.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Stipulation Re Settling, Allowing and Approving  
Statement of Evidence.**

It is hereby stipulated and agreed that the annexed statement of the evidence and exhibits consisting of one volume of evidence from pages 1 to 270, inclusive, and of the various exhibits of the respective parties now in possession of the clerk of the court may be by the Court settled, allowed and approved as correct.

It is further stipulated that such exhibits which are not included in the transcript of the exhibits



may be certified to the Circuit Court of Appeals in their original form.

Dated Portland, Oregon, this 19th day of February, 1923.

THOS. MAGUIRE,

Asst. Attorney for the United States.

WINTER & MAGUIRE,

JOHN F. REILLY,

Attorneys for E. W. A. Peake.

JOHN F. LOGAN,

ISHAM N. SMITH,

Attorneys for C. L. Boss and Boss & Peake Automobile Company. [73]

In the District Court of the United States for the District of Oregon.

No. L—8786.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a Corporation, C. L. BOSS and E. W. A. PEAKE,

Defendants.

**Order Settling Statement of Evidence.**

The foregoing statement of evidence and proceedings in the above cause named in the caption consisting of one volume, pages 1 to 270 inclusive, of the testimony and the exhibits introduced in evidence shown by said transcript and in possession of the clerk of the above court, is in due time

presented to the judge of this court and is approved by him as true, complete and properly prepared, said parties having stipulated that the record be prepared in question and answer form and that the Court approve the same; and it appearing to the Court that the nature of the case is such that it is proper that, and the ends of justice will be best subserved by presenting the record prepared in question and answer form.

And it is further ordered that all exhibits referred to in said statement shall be deemed a part hereof the same as if fully set out therein.

Dated Portland, Oregon, this 19th day of February, 1923.

CHARLES E. WOLVERTON,  
Judge. [74]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation.

LESTER W. HUMPHREYS, U. S. Attorney, for  
the Government.

JOHN F. LOGAN and I. N. SMITH, for Defendant  
Boss.

JOHN F. REILLY and ROBERT F. MAGUIRE,  
for Defendant Peake.

Before CHARLES E. WOLVERTON, District  
Judge.

Portland, Oregon, May 22, 1922, 2 P. M.  
(May 23, 24, July 7).

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**Testimony of M. E. Walker, for the Government.**

M. E. WALKER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. HUMPHREYS.)

Mr. Walker, what is your business?

A. Deputy Collector of Internal Revenue.

Q. For what district? A. District of Oregon.

Q. Do you know anything about the efforts made by the collector to collect a tax on the income of the Boss & Peake Automobile Company?

A. I do.

Q. What demands, if any, were made for their tax, and upon whom were those demands made, and when?

Mr. REILLY.—Confining yourself to your personal knowledge, and not what some one told you.

A. A notice and demand on form 1-17, which is

(Testimony of M. E. Walker.)

the first notice and demand, was made and mailed from the office on August 7, 1920.

Q. To whom?

A. To Boss & Peake Automobile Company, 615 Washington St., first.

Q. What further demand was made, if any?

A. A further demand was made on Mr. E. W. A. Peake, on the same form.

Mr. REILLY.—That is objected to. The document will speak for itself. The witness is presuming to testify to the contents of an alleged document. The document will speak for itself.

COURT.—When was that mailed? [76—1]

A. To E. W. A. Peake, on the same date, and I have a registry return receipt here on the 18th.

COURT.—What is your objection, Mr. Reilly?

Mr. REILLY.—He is presuming to testify that a demand was mailed to Mr. Peake, made upon Mr. Peake. Now, that demand apparently was in writing, and we have here a document which no doubt he refers to, and it is not a demand upon Mr. Peake; and I object to the witness being permitted to testify to the contents of that document, that is, to make the statement that it was a demand upon Mr. Peake. Something was mailed, but what it was, the document will show for itself.

COURT.—We are only getting at the date now.

Mr. HUMPHREYS.—The date and to whom it was addressed.

Mr. MAGUIRE.—That is the very point. The document shows to whom it was addressed.

(Testimony of M. E. Walker.)

A. No.

COURT.—I presume that would be true.

Mr. MAGUIRE.—We have the document here if he wants to identify it.

Mr. HUMPHREYS.—We don't claim anything for what Mr. Walker says about the contents. We can get along better, perhaps, if they will produce the document. It may be stipulated that this particular document was mailed by the collector to Mr. Peake on a certain day.

Mr. REILLY.—No, we won't admit that.

Mr. HUMPHREYS.—How did Mr. Peake get it?

Mr. REILLY.—Mailed to Boss & Peake Automobile Company, care of Mr. Peake.

Mr. HUMPHREYS.—We will have it that way, then, whatever the fact is. It came into Mr. Peake's hands, didn't it? It [77-2] was addressed to Mr. Peake. I offer this registry return receipt in evidence. (Marked "Government's Exhibit 1.")

COURT.—You say it was addressed to Mr. Peake?

Mr. REILLY.—Yes, the envelope was addressed to Mr. Peake; not the document itself.

Mr. HUMPHREYS.—Will you let me have the envelope, Mr. Reilly?

Mr. REILLY.—Yes. (Produces envelope.)

Mr. HUMPHREYS.—May we stipulate that this paper, which is Form 1-17, notice and demand for tax, was mailed in the envelope addressed E. W. A. Peake, Esq., by the Collector of Internal Revenue

(Testimony of M. E. Walker.)

for the district of Oregon? Is that agreeable, Mr. Reilly?

Mr. REILLY.—Yes.

Mr. HUMPHREYS.—I offer these in evidence.

(Notice and demand marked “Government’s Ex. 2-A.” Envelope marked “Government’s Ex. 2-B.”)

Mr. HUMPHREYS.—What other enclosures were with this, if any?

Mr. REILLY.—I think none.

Mr. HUMPHREYS.—You may cross-examine. It is admitted by Mr. Boss that demand was made on him?

Mr. LOGAN.—Yes. The corporation has been out of existence for two years. A similar document to that was addressed to Mr. Boss.

#### Cross-examination.

(Questions by Mr. REILLY.)

Mr. Walker, at the time this document was mailed in this envelope addressed to Mr. E. W. A. Peake, you were acting on the strength of some affidavits that had [78—3] been filed by Mr. Boss with the Department, were you, and consultations that you had had with Mr. Boss and with Mr. Logan, his attorney? A. No.

Q. Had you made any investigation independent of that induced by affidavits of Mr. Boss and Mr. McRell, his partner, and Mr. Logan? A. No.

Q. Had you made any other investigation than that which you made in response to their affidavits? A. No.



(Testimony of M. E. Walker.)

Q. In that investigation, did you apply to Mr. Peake for his side of the controversy? A. No.

Q. When this notice was given, didn't Mr. Peake and myself wait upon you and ask you, if you intended that as a demand upon Mr. Peake, to make the demand upon Mr. Peake in writing so as to give us a chance to take the stand that we would take then?

A. I cannot distinctly recollect.

Q. Well, you recollect me, don't you?

A. I do.

Q. You recollect Mr. Peake and myself calling upon you?

A. Yes. That was after the notice was sent out.

Q. After the notice was sent out. Immediately after the notice was sent out, wasn't it?

A. Yes.

Q. All right. Didn't Mr. Peake and myself, at the Custom House, I think just the three of us being present— A. Yes.

Q. Within a day or two after this notice was sent out, *request* [79—4] *you*, if you wanted that to be considered as a demand upon Mr. Peake, to make it in the form of a demand on Mr. Peake?

A. I cannot distinctly recollect.

Q. You would not say that that conversation did not take place? A. No.

Q. Let me ask you whether you remember refusing to do so? A. I cannot recollect that.

Q. And did you not say in that same conversation that your mind was made up, and that you had

(Testimony of M. E. Walker.)

an idea as to who was right and who was wrong in this controversy?     A. No.

Q. Did you make any statement similar to that?

A. I couldn't have made it.

Q. Now, at that same time, in that same visit, didn't Mr. Peake and myself ask you to let us see the return that had been made by the corporation?

A. I don't recollect that.

Q. Did you not refuse to let us see it?

A. I don't recollect that.

Q. Unless we would admit that we owed half of the tax?     A. No, sir, I don't recollect it.

Q. No conversation of that kind at all?

A. I have a faint recollection of a conversation similar to that; but this is the way I had it: that you didn't admit liability—you asked to see papers in which you admitted no liability, which is contrary to the provisions of the statute.

Q. Well, then, do I understand from that, that you did refuse to let us see the return made by the Boss & Peake Automobile Company?

A. With that qualification, yes. [80—5]

Q. Well, you did refuse?     A. Yes.

Q. And you did this, notwithstanding the fact that you were making a claim against us?

A. I did it because of the fact that you denied liability, is my recollection.

Q. You expected us to admit liability, and then you would let us see anything we wanted to see?

A. Yes. You would then admit yourself as a part of the corporation.

(Testimony of M. E. Walker.)

(Examination by Mr. LOGAN.)

Q. At that time, Mr. Walker, there had been returns made by C. L. Boss Automobile Company in 1920?

A. I wouldn't like to state that without seeing the record.

Q. Did you know whether Mr. Weldy at that time had made an investigation of this Boss & Peake Automobile Company?

A. I couldn't state definitely whether it was Mr. Weldy. I knew there was a revenue agent made an investigation.

Q. Or Mr. C. C. Cramer.

A. Over the signature of C. C. Cramer, the revenue agent in charge.

Q. Mr. Summerfield? A. No, sir.

Q. Now, as I understand it, you were telling Mr. Reilly and Mr. Peake that unless they admitted the liability—

A. No, they denied liability.

Q. Unless they admitted some liability, you would not show the records to them?

A. Yes, unless he admitted that he was interested in the corporation at the time.

Q. You did that under rule of the law—under the rule of the department?

Mr. REILLY.—That is not cross-examination, your Honor. [81—6] Mr. Logan has had opportunity to examine this witness. Mr. Logan cannot step into the Government's shoes and lead this witness, that he has already convinced be-

(Testimony of M. E. Walker.)

fore we had an opportunity to be heard in the matter. He certainly should not be allowed in here to put words in this witness' mouth to defend the stand he made when he even refused to make demand on us. If it is redirect, well and good; it may be done in the form of redirect.

Mr. LOGAN.—I have not spoken to this witness since we were down there about two years ago, have I, Mr. Walker?

A. No, not that I recollect.

Q. You have not seen me, have you, since this case was filed? A. No, I have not.

Q. I will ask you whether or not you could, under the rules of the department, have shown it to any party other than one who admitted his interests? A. No.

Q. Did you have more than one conversation with Mr. Peake or his legal representatives?

A. My recollection is only one.

Q. Did you write them other letters after that?

A. Not that I have any recollection of, outside of this.

COURT.—The records ought to show that.

Mr. LOGAN.—I wouldn't know it, your Honor, of course; I am inquiring as to that.

(Questions by Mr. REILLY.)

Q. What is the number of this rule of the department which says that you cannot let a person against whom you are making a claim see the papers? What rule is that?

A. There is no such rule. It says you cannot

(Testimony of M. E. Walker.)

disclose the [82—7] information contained in an income tax return or any investigation concerning it, or anything concerning the income tax of another individual, or corporation, or partnership.

Q. Have you any rule which says you cannot divulge the information on which you base your claim to the person against whom you are making your claim? A. No.

Q. And that was what you refused to do in this instance, wasn't it?

A. No, because liability was denied.

Q. Weren't you making a claim against Mr. Peake?

A. I was making—mailed a claim against him as one of the Boss & Peake Automobile Company.

Q. You were making no claim against Mr. Peake personally? A. No more than to find Mr. Peake.

Mr. HUMPHREYS.—That is hardly fair cross-examination. The attitude of the Government is not to be determined or measured by what was in the mind of this particular witness. The attitude of the Treasury Department regarding Mr. Peake's liability is not to be determined by what is in the mind of this individual.

Mr. REILLY.—I sincerely hope not, Mr. Humphreys. The question is asked to show whether there was a demand, to show the attitude of the witness on the question of demand, so we may know how to measure the value of his testimony.

Mr. HUMPHREYS.—All right.



COURT.—I understand that this controversy is practically between Boss and Peake?

Mr. HUMPHREYS.—It is, your Honor. What I am trying [83—8] to prove is that we made demand on these individuals. That is all I offer this witness for. The cross-examination has gone beyond the question of demand.

COURT.—That must be admitted. Any other questions of this witness?

Mr. REILLY.—No, your Honor.

Excused. [84—9]

Mr. HUMPHREYS.—If your Honor pleases, I now offer in evidence certified copies which have come to me from the Secretary of the Treasury, under the seal of the Secretary, which are the income tax returns of the Boss & Peake Automobile Company with the accompanying documents which were filed at that time. I offer them at this time because they are certified by the Secretary of the Treasury as being photostatic copies of those documents which relate to the particular corporation.

(Marked "Government's Exhibit 3.")

COURT.—Mr. Humphreys, I understand the law under which this tax was levied was a law that was enacted in October, 1917, with retroactive effect?

Mr. HUMPHREYS.—Yes, your Honor.

COURT.—This return was made when?

Mr. HUMPHREYS.—March, 1920.

COURT.—Well, now, do they make that return the basis of the assessment of the tax?

Mr. HUMPHREYS.—Yes, your Honor; and the



documents which I am offering are certified by the Secretary of the Treasury as being copies of the originals in his possession, and which were submitted all together as a part of the return on which this tax was based.

COURT.—There is no controversy as to the validity of this later act?

Mr. HUMPHREYS.—The law itself, I understand there is not.

Mr. MAGUIRE.—No. I understand the Supreme Court has already held that Congress had the right to make that act retroactive, so we are not raising that question. [85—10]

COURT.—That would bind this Court.

Mr. LOGAN.—Neither side has raised the question of the constitutionality of the law, your Honor; and I want to say that neither one of the gentlemen at the time—I think I am correct—ever had in any of their actions any intention of evading this law, because it was finished, and whether it was a sale of stock or a division of the assets, it was made without reference to the payment of a tax.

Mr. HUMPHREYS.—We make no claim that anybody was trying to evade the law at that time.

COURT.—I suppose the Boss & Peake Automobile Company is liable for it anyhow.

Mr. LOGAN.—The corporation is liable to the Government for \$6,000; originally \$12,000, of which \$6,000 has been paid.

Mr. REILLY.—I may say, your Honor, we don't know anything about this tax. We have no means of checking it. We have denied the tax, and we want the Government to prove it. We will not contest it very vigorously, but we want to know how it was arrived at.

COURT.—The Government is trying to prove its case now.

Mr. MAGUIRE.—We object to this, upon the ground that this certified copy of the return is a return not made by the corporation, but made by Mr. Boss as part stockholder, made on March 1, 1920, nearly three years after we ceased to have any interest in the corporation; that therefore the defendant Peake could not be bound by any acts or declarations of either the corporation or any stockholder of the corporation.

COURT.—When was that return made?

Mr. MAGUIRE.—March 1, 1920. Peake sold out to Boss in May, 1917, almost three years prior. This is headed [86—11] "Name of Corporation. Boss & Peake Automobile Co.," giving its address and business. Then it is signed "C. L. Boss, Part stockholder." The word "President" is scratched out. The word "Treasurer" is scratched out. It is not made by any officer of the corporation, or anyone purporting to be an officer of the corporation.

Mr. HUMPHREYS.—But by one who was an officer of the corporation when the corporation had officers.

Mr. MAGUIRE.—Attached in this certified copy are a number of documents. First, is a photographic copy of a second notice and demand of tax made on the corporation, which does not tend to prove any part of the Government's case in this matter.

COURT.—Is that the notice and demand introduced here?

Mr. MAGUIRE.—No, it is an additional notice and demand. It is headed "Second notice and demand." There has been no proof as to that, your Honor. Then appear photostatic copies of affidavits made by R. J. McRell and by C. L. Boss.

COURT.—Who was R. J. McRell?

Mr. MAGUIRE.—R. J. McRell was one of Mr. Boss' partners after Mr. Peake sold out to Mr. Boss.

Mr. SMITH.—When the corporation ceased doing business, he was and is now Mr. Boss' partner, and he is the one who bought in with Mr. Boss in the partnership running from that date.

Mr. HUMPHREYS.—The reason all these various papers are here is, as I understand it, that this return, being made in March, 1920, three years or two years after it ought to have been made, was made in connection with the explanation of why these men ought to be relieved of the consequences of their delinquency in making returns. These affidavits, letters and [87—12] things Mr. Maguire is objecting to were sent with the return, stating why they should be relieved from the con-

sequences of the delinquency. As I understand it, the whole thing taken together constitutes the return, as received in the Treasury Department, of the income tax liability of the Boss & Peake Automobile Company. There are other things in there, but if there is anything there that ought not to be there, certainly the Court can disregard it. That they are competent, I do not have any question.

COURT.—Are you through with your objection?

Mr. MAGUIRE.—No, your Honor. Either counsel for the Government and counsel for Mr. Boss have not read those affidavits, or it has entirely escaped their minds. There is not a single word in one of those affidavits that tends to explain or minimize the proposition of their not making a return in time. These affidavits of Mr. McRell and Mr. Boss are in there solely as arguments to the Government showing that Mr. Peake should be held to one-half of that tax. Now, then, the only matter in here that is signed by Mr. Peake or addressed to Mr. Peake is a photostatic copy of a letter written by him in August, 1920, after the Government had mailed this demand to him.

Mr. HUMPHREYS.—I want that to go in as evidence that he got that demand.

Mr. MAGUIRE.—If that is what you want, we will have no objection to that particular letter going in. But the affidavits of the two parties, which are self-serving declarations made three years after the time of the transaction itself, when they

were endeavoring, although they held the capital stock, to relieve themselves of half of the tax that the [88—13] Government had against them, are not competent evidence. They are made *ex parte*, there is no right of cross-examination; it does not tend to prove a single fact. And that same thing, your Honor, is true with regard to the return made. How can the defendant Peake be bound by a declaration of Boss, not made as an officer of the company, and, even if made as an officer of the company, subsequent to the time he sold out.

COURT.—You don't attempt to deny the fact that a return was made by Boss & Peake Automobile Company?

Mr. MAGUIRE.—Yes, I do.

COURT.—That is, the corporation?

Mr. MAGUIRE.—Yes, I do. There has been no legal return made by Boss & Peake Automobile Company; no legal return made.

COURT.—Do you claim there was a return made by Boss alone?

Mr. MAGUIRE.—Yes, sir. This corporation was dissolved in June, 1917. For the purpose of suit, being sued, making returns, winding up its business, it and its then officers remained in office, except they should be removed by resignation or disposition of stock, for a period of five years. That corporation had, in fact, continued existence and continued officers, and no man by setting himself up here and saying "I am a part stockholder" can



make a return for a corporation. It is not recognized by the law or by regulations.

Mr. HUMPHREYS.—Counsel would have a situation where it would be impossible for the Government to collect from a corporation after it ceased to exist. If we could not get a return from Boss, from whom could we get a return?

Mr. MAGUIRE.—You don't have to get a return from [89—14] anybody. The Government can go into a person's books, and say, This is what you owe us.

Mr. HUMPHREYS.—Then, when we come into court, we cannot prove it.

Mr. MAGUIRE.—Yes, you can.

COURT.—I think the Court will admit that record for what it is worth. There is no objection made to its certification?

Mr. MAGUIRE.—Oh, no, no.

COURT.—The Court will admit it for what it is worth. If there are parts of it not relevant to the inquiry here, the Court will not pay any attention to them.

Mr. MAGUIRE.—Very well, your Honor.

Mr. HUMPHREYS.—Now, your Honor, this is a return: "Name of Corporation, Boss & Peake Automobile Co. 615 Washington Street, Portland, Oregon." This return was made by "C. L. Boss, Part stockholder." This is the form in which the oath is written on the return: "We, the undersigned, president and treasurer of the above-named company, whose return of net income is



herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular." Signed, "C. L. Boss, Part stockholder," before "B. B. Weldy, Internal Revenue Inspector." And in general it shows a total income of \$37,668.79; deductions, \$15,118.85; leaving net taxable income of \$22,546.94, and net tax assessable of \$12,405.30. I won't go into all the detail. It is accompanied by an affidavit: [90—15]

"I hereby solemnly swear that my delinquency in filing corporation excess profits for 1917 return as required by Boss & Peake Automobile Co. was not due to any intent to violate the law or to evade taxation, but was due to:

At the time of dissolution no excess profits tax law had been enacted and I attempted to make a return for my share of the earnings of the corporation in my personal return as the return itself and correspondence with the Collector at Portland and the Commissioner at Washington will show.

Desiring to compromise my liability I hereby tender the sum of \$            which I request to be accepted in compromise of the specific penalty only.

(Signed) C. L. BOSS."

Also sworn to before Weldy.

The only other thing I want to read to your Honor at this time—I don't care about these affidavits to which counsel objects so strenuously—is a letter dated August 18, 1920, which your Honor will note is within a few months after the date of the return itself, addressed to the Honorable Milton A. Miller, Collector of Internal Revenue, Portland, Oregon:

“Dear sir: I am in receipt of a notice and demand for tax addressed to Boss & Peake Automobile Company, Form 1-17 Account No. June 23, B6-1 Additional 1917 Income Tax, together with a mimeographed copy of an instruction to Collectors concerning collection of taxes on corporations dissolved before the date of the tax.

From this circular I understand that persons sharing in the assets of corporations at dissolution are obligated to pay in proportion to the assets which they have received. This circular, however, has no application to me because I had sold all my stock in the corporation to Mr. C. L. Boss, and severed my connection with the corporation entirely before its dissolution, and had no part in the dissolution whatever and received no assets of the corporation in such dissolution. My stock was sold to Mr. Boss on June 1, 1917, and by this sale Mr. Boss acquired control of the corporation. I am advised that thereafter Mr. Boss and the other stockholders arranged for the dissolution of the corporation, but of this I know only by hearsay as I had no part in the transaction.

Yours very truly,

E. W. A. PEAKE.”

(Testimony of B. B. Weldy.)

This is merely for the purpose of establishing the demand and the understanding of Mr. Peake that demand was being made upon him for that tax.  
[91—16]

**Testimony of B. B. Weldy, for the Government.**

B. B. WELDY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. HUMPHREYS.)

What is your business, Mr. Weldy?

A. Revenue agent, income tax unit.

Q. Did you ever have anything to do with the examination which had to do with the liability of Boss & Peake Automobile Company for a tax?

A. I did.

Q. When did you make that examination?

A. The latter part of February, 1920.

Q. How did you come to make it?

A. I was instructed by the revenue agent in charge to make an examination of the books and income tax return of C. L. Boss Automobile Company, and I found that between the time of the dissolution of C. L. Boss & Company and C. L. Boss Automobile Company there had been a corporation Boss & Peake corporation, and on instruction of the internal revenue agent in charge, I made the examination of Boss & Peake Automobile Company's books.

COURT.—You made that in person?

(Testimony of B. B. Weldy.)

A. Yes, sir.

Q. Now, where did you make that examination?

A. At the office of the C. L. Boss Automobile Company.

Q. Why did you make it there?

A. Because the books were there.

Q. What books did you find there?

A. Well, I couldn't tell you right offhand, but the ordinary [92—17] books found—books of record. I believe there was a cash-book, a journal and ledger.

Q. From your examination of those books, are you able to say what the total income of Boss & Peake Automobile Company, a corporation, was from January 1 to June 30, 1917, or any period included in those times?

Mr. REILLY.—Objected to. The books speak for themselves. We don't want to make this unnecessarily long, but we don't want a mere conclusion of the witness in a matter of this kind.

Q. Did you make a report on that?

A. Yes, sir.

Mr. REILLY.—Where is that record?

A. I think Mr. Humphreys has the photostat of it.

Q. In what form was the record?

A. In my report. You have the photostat there, I think.

Q. Is this your report?

A. Yes, this is my report.

Q. Or is this it?

(Testimony of B. B. Weldy.)

A. Well, that is part of it, perhaps. This is C. L. Boss personally. This is C. L. Boss Automobile Company. There must be one there for the Boss & Peake Automobile Company also.

Q. Is that it? A. Yes.

Q. What was the total amount of the income of that corporation for that period?

A. The books indicate a total income of twenty-two thousand plus during the corporate period.

Q. I asked for the total income.

A. Oh, I don't know what the total income was.

Q. I didn't ask you about the taxable income. I asked you for the total income. [93—18]

A. The total income was \$37,668.79 for 1917.

COURT.—Is that January 1st to January 1st?

A. To June 1, 1917.

(Examination by Mr. MAGUIRE.)

Q. Mr. Weldy, this was a concern that was engaged in the sale of articles of merchandise—automobiles and automobile parts? A. Yes.

Q. In figuring up your return, did you have an inventory of the physical assets of that concern of January 1, 1917?

A. Not that I remember of.

Q. Did you have an inventory as of June 1, 1917.

A. No, sir; I don't think so.

Q. Did you have one as of May 31, 1917?

A. No. It was not necessary, because the books showed that there had been a sale.

Q. Been a sale? A. The business was closed.

Q. Well, if you have a merchandise business



(Testimony of B. B. Weldy.)

which is run upon an accrual basis, as that business was, where there was paper out, debts of various kinds, and credits coming in, how could you arrive as to the net income without having either a beginning inventory or an ending inventory?

A. We simply took the books, the profit and loss account.

Q. You simply took the profit and loss account?

A. Yes.

Q. Now, if you had taken into account—of course, it is not your fault, because they didn't have such an inventory—but without an inventory, both closing and opening, there is no way whereby any one can tell that the profit and loss account is accurate, is there? [94—19]

Mr. LOGAN.—That is making this witness his own witness in this matter. We will submit the books to the gentlemen, and show your Honor just how it was found.

Mr. HUMPHREYS.—If I can only get at a *prima facie* case here, then I would like to wash my hands of it and let counsel go to it.

Mr. SMITH.—Let the record show that Mr. Boss produces his books.

COURT.—I think you better let Mr. Humphreys go on and make the case for the Government, so far as he is able to do it. Then if there is any objection raised to the liability of one party or the other, let that be brought forward by themselves. I think we will get along better that way.

Mr. MAGUIRE.—If the Court will permit me



(Testimony of B. B. Weldy.)

just one thought: You see, we are now getting the benefit of Mr. Weldy's examination and his conclusions. I take it that if we could show, upon a preliminary question, that he was necessarily deprived of the data from which correct conclusions could be reached, the Court would not listen to the testimony in that respect.

COURT.—That is the evidence upon which the Government acted in levying this tax. If the evidence is not sufficient to support the tax, that is another question.

Mr. MAGUIRE.—I see.

Mr. SMITH.—I want the record to show, if the Court please, that Mr. Boss has brought the full records of the transaction of the business of the Boss & Peake Automobile Company into court, offered them to the Government, opposing counsel, or the court throughout this trial, to substantiate any fact sought to be proven. [95—20]

COURT.—You may proceed, Mr. Humphreys.

#### Direct Examination Resumed.

Q. Now, Mr. Weldy, from your examination of the books of the Boss & Peake Automobile Company, you have stated, I believe, what the whole income was during the period mentioned?

A. Yes.

Q. Now, what was the net taxable income during that period?

A. The net taxable income, according to the books, was \$22,142.43, for 1917, and the corrected net income, on which tax was assessed, was \$22,-549.94.

(Testimony of B. B. Weldy.)

Mr. HUMPHREYS.—The rate of taxation, I suppose, your Honor will take judicial notice of, being fixed by the statutes at that time. It is not necessary to prove that?

COURT.—What was the rate of taxation at that time?

Mr. HUMPHREYS.—Let me have the return.

A. Here it is. It is 2 and 4 per cent, normal tax.

COURT.—Never mind. I am familiar with that.

Mr. HUMPHREYS.—Two, one and four.

A. Just two and four applies to this.

Mr. HUMPHREYS.—Two and four only applies to this.

Mr. MAGUIRE.—That is normal?

A. Normal tax. Excess profits tax is graduated.

Q. Are you able to state what amount was subject to excess profits tax?

A. The whole amount, less the deductions for invested capital, percentage of invested capital, and a specific deduction of \$3,000 for the year, but it is prorated for the number of months.

Q. What part, if any, of that tax was paid?

Mr. HUMPHREYS.—I suppose there is no dispute that half of [96—21] it was paid?

Mr. MAGUIRE.—There is no dispute that Mr. Boss paid a certain amount of money alleged in the complaint.

Mr. HUMPHREYS.—I mean, half the tax assessed. Half the tax which the Government as-

sessed was paid. I understand that will be admitted?

Mr. MAGUIRE.—Yes.

Mr. LOGAN.—I suppose it will be conceded that it was paid by Mr. Boss?

Mr. MAGUIRE.—Yes, it was paid by Mr. Boss.

COURT.—What was the amount paid by Mr. Boss?

Mr. HUMPHREYS.—\$6,202.65.

COURT.—You are now claiming that same amount?

Mr. HUMPHREYS.—Plus interest and penalty.

Mr. LOGAN.—Since the time.

COURT.—What is that?

Mr. HUMPHREYS.—There was five per cent general penalty and one per cent per month penalty, which of course accrues. Five per cent penalty amounts to \$310.13, and there is one per cent a month from the 15th of August, 1920, which would be approximately about 20 per cent more now.

Mr. LOGAN.—Mr. Boss, on August 17, 1920, paid \$6,202.65. He got a receipt.

COURT.—Was the firm or corporation subject to a penalty under the excuse which was made by Mr. Boss?

Mr. HUMPHREYS.—No, your Honor, the penalty was for the failure to pay the half which has remained unpaid.

COURT.—I see. Very well.

Mr. HUMPHREYS.—The Government did not attempt to impose any penalty on them for failure

(Testimony of B. B. Weldy.)

to pay up to the 15th of August, [97—22] 1920. But the penalty is for the failure to pay the remaining half, which was not paid, from that time on.

Q. Now, Mr. Weldy, can you, with the assistance of Mr. Logan's and Mr. Smith's offer, indicate from the original records that you examined the amount of the whole income, total income of the Boss & Peake Automobile Company, on which this tax was based? A. I believe I can, yes.

Mr. REILLY.—May I ask a question that may expedite matters, possibly?

(Examination by Mr. REILLY.)

Q. Have you your work-sheets available, Mr. Weldy? A. No, sir.

Q. Are they in Portland?

A. Yes, in the revenue agent's office.

Q. Would it expedite matters any to send for them?

A. I don't think it will, Mr. Reilly. I looked over them this morning, and they are just the same as my report. I have not turned anything in except what was shown in the report, so I don't think that they would.

COURT.—Well, now, the question asked, will you answer that? It has not been answered yet.

Q. (Question read.) A. Yes, sir.

Direct Examination Resumed.

Q. Will you do that, please?

Mr. REILLY.—Is the book paged? A. No.

Mr. REILLY.—Tell us the name of the account each time.

(Testimony of B. B. Weldy.)

A. This is Profit and Loss. This book we are interested in in making the examination, this is all written up as of May [98—23] 31, 1917, except the last entry, June 17, 1917. This is an exact copy—or mine is an exact copy of the profit and loss. It shows on one side the expenses and the amount paid to E. W. A. Peake and to C. L. Boss and the surplus account. On the other side it shows the income from Hudson cars, Maxwells, accessories, factory parts, gas and oil, miscellaneous stock, shop and tires. Those are items of income, showing the net income from those sources. The other side shows expenses for advertising, and then the general expense—expense of demonstrators, territory, travel expense, insurance, membership and subscriptions, postage, service, stationery and printing, storage, telephone and telegraph, transferred to E. W. A. Peake, transferred to C. L. Boss, and transferred to surplus account. The total of each side is \$41,524.98. Now, that takes in the earnings and expenses for the entire corporate period. The charge for 1916 I have segregated, and it shows a total of \$3251.98.

Mr. REILLY.—Profit?

A. No. That is the expense account applicable to 1916. Now, in making this examination, I did not retain copies. I could not get any retained copies of returns that had been filed. And in running over the expense account, I discovered an item of \$12.08, representing income tax paid for the year 1916, paid in 1917, and showing a net income



(Testimony of B. B. Weldy.)

of \$604.21. Now, there was no way that I could do, without making a complete audit, to find the earnings for 1916, so I took the expense account and set up a probable earning for 1916, and deducted this expense account, and arrived at the net of \$604.21. The balance all went into 1917. The books did not show the transactions for 1916 separately, as is usual, or the general way is to close at the end of each period; but they were not closed. [99—24] Therefore I could not find the net income for that period in any other way.

Q. Now, how did you arrive at the net taxable income?

A. Well, I deducted the portion for 1916, and the difference I set up as the net income, or the gross income rather for 1917, and deducted the expenses for 1917, and arrived at the net income that way.

Q. What were the expenses for 1917 during that period of June?

A. Expenses for 1917, \$15,526.36.

Q. Of what were they composed?

A. Advertising \$659.47, advertising Hudson cars \$1017.90, advertising Maxwell cars \$978.47, general expenses \$7810.95, demonstrators—expense of demonstrating \$1764.78, traveling expense on territory \$1320.07, insurance \$171.37, membership \$285.61, postage \$208.89, stationery and printing \$195.10, telegraph and telephone \$322.87, storage \$151.92, service \$638.96; total of \$15,526.36.

COURT.—You deducted that from what amount?



(Testimony of B. B. Weldy.)

A. I deducted that from the sales and operations, \$37,668.79. I didn't make any changes.

COURT.—That makes what amount?

A. The net, according to the books would be \$22,142.43, but I found one item of \$395.43 representing furniture and fixtures purchased and charged to expense, which I took out and set up as an assets account. Also income tax of \$12.08, which I eliminated, because the income tax is not deductible under any circumstances as an expense. That left the corrected net earnings of \$22,549.94.

Q. Now, Mr. Weldy, your examination began as of what time?

A. The time the Boss & Peake Automobile Company took over the [100—25] assets of the C. L. Boss Automobile Company, the 28th or 26th day of November, 1916.

Q. And continued until what time?

A. The 31st day of May, 1917.

Q. What caused you to fix that time?

A. The profit and loss showing that at that time the Boss & Peake Automobile Company ceased to do business.

COURT.—What was the date they ceased to do business?

A. May 31, 1917. Well, it is here June 1st, but just one day, so we considered it as of May 31st.

Cross-examination.

(Questions by Mr. LOGAN.)

After that, did you have occasion to go over the

(Testimony of B. B. Weldy.)

books of the C. L. Boss Automobile Company partnership?   A. Yes, sir.

Q. What day did you fix as the beginning of the partnership known as the C. L. Boss Automobile Company?   A. June 1, 1917.

Q. Who composed that partnership, if you know?

A. C. L. Boss and R. J. McRell.

Q. In the return for 1917, how were they allowed with reference to the time of operation, and what deductions were allowed with reference to capital?

Mr. MAGUIRE.—I don't think that is competent.

A. I don't quite get what you want.

Q. What did the Government impose on them as limitation of time of activity?

Mr. MAGUIRE.—Just a moment. If the Court please, limitation the Government might have placed upon their beginnings or endings would not be binding upon any of the [101—26] parties to this transaction. It would not be evidence here in court. The Government investigations do not determine a fact. We are here in court to determine this, and it must be determined by competent evidence.

COURT.—The fact is, that the Government made its account between certain dates, and the termination of the account was on June 1st. That is about all there is to that.

Mr. LOGAN.—That is all there is to it. I want to make it clear, however, that the Government

(Testimony of B. B. Weldy.)

stopped holding the corporation as of June 1st, and commenced the partnership.

Q. Now, Mr. Weldy, did you examine all the accounts in these books? A. Not necessarily, no, sir.

Q. Did you attempt to look in these books, and see whether or not there was any way of finding the profits on any automobile?

A. Oh, yes. I looked all through anything that would give light on the expense accounts or on the income. But I didn't make this as a part of my report.

Q. Were you able to ascertain, in looking over these accounts,—for instance, I refer you to the account of April 2, 1917, under the head of Hudson Motor Car Company, car account, shipment of cars which were sold to J. B. Skinner, Ben Croeni, William Cornfoot and Charles E. Stolte,—are you able to turn forward and see the profit or loss on those accounts?

A. I followed them through at the time. I don't remember just now.

Q. Now, look at the account, for instance, of Mr. Skinner, see if by this account you can tell what profit was made upon that particular car.

A. That would indicate a profit of \$212.29. [102—27]

Q. And the car that was sold to Mr. Croeni?

COURT.—Do you propose to follow that through with each individual car?

Mr. LOGAN.—No, your Honor. I just show these as sample cars, so the gentlemen on the other

(Testimony of B. B. Weldy.)

side can test this out. I was just asking this gentleman because he was asked by Mr. Maguire a few minutes ago as to the showing of profit on each car. I will go into that in detail later on.

Q. Does the same thing show with reference to Mr. Cornfoot? A. Yes, sir; \$385.39.

Q. And Dr. Stolte?

A. That was \$283.16 profit.

Q. Do you know whose handwriting that is?

A. No, sir.

Q. Did you have occasion to look into the question of any division of profits, or anything else with reference to wages or salaries, between Mr. Boss and Mr. Peake? A. Salaries are an expense.

Q. I will ask you to look at what is known as the combined cash and journal under the heading June, 1917, folio 120—there seems to be no other way of designating it. I will ask you to read to his Honor.

Mr. MAGUIRE.—We object to this evidence as not being made by the defendant Peake, nor at a time when he had any control over the books or the manner in which Mr. Boss conducted the business; therefore, being a self-serving declaration on the part of Mr. Boss, not binding upon Mr. Peake.

Mr. LOGAN.—We will connect it up, your Honor, with Mr. Murphy, Mr. Peake's witness, who was there at that time and thereafter, and it is in the handwriting of Mr. Murphy, [103—28] the then bookkeeper.

COURT.—You propose to establish by your own

(Testimony of B. B. Weldy.)

testimony, I suppose, the accounting between Mr. Boss and Mr. Peake?

Mr. LOGAN.—Yes, your Honor.

COURT.—Why inquire of the revenue officer about that? You know more about those books than the revenue officer knows. He had nothing to do with that business. Are you attacking the accuracy of his report?

Mr. LOGAN.—No, your Honor.

COURT.—Then I don't see why you put that in.

Mr. LOGAN.—All right. We will show that later.

Mr. SMITH.—There is one fact, if the Court please, that I think we can agree on. I would like to ask the attorneys for Mr. Peake whether they will agree that from June 1, 1917, and for the remainder of the year, the income tax in all of its phases upon this business was paid by the new partnership of Boss and McRell, under the name of the C. L. Boss Automobile Company?

Mr. REILLY.—We don't know anything about it. If you can prove it, prove it.

COURT.—Are you through with the cross-examination?

Mr. LOGAN.—Yes.

Cross-examination by Mr. MAGUIRE.

Q. Is it a matter of fact, Mr. Weldy, that, under the Government regulations, it is held to be essential, in making a return upon an accrual basis, as you have made here, you have both the initial and final inventories?



(Testimony of B. B. Weldy.)

A. No, sir, not when it is the closing, at the end of a corporate period. If it was just in between time, we would have to have that information. But the books showed, as a [104—29] complete transaction, the purchase of the assets from C. L. Boss & Company at the beginning of the corporate period, and at the end of the corporate period it was closed out, and it was not necessary to have an inventory at either time.

Q. Well, now, Mr. Weldy, what became of the physical assets? What do the books show became of the assets at the end of the corporate period, May 31, 1917? What do the books show about that? A. I cannot tell you.

Q. Then, what was the value of the physical assets at the end of the corporate period?

A. I don't know that, because it was not necessary to see that for my purposes. The profit and loss showed it was closed. It was a closed transaction—there were no assets.

Q. Let us have the books—perhaps I don't quite understand you. I am not a bookkeeper, so I kind of have to have you help me out on this.

A. I will be glad to, if I can.

Q. You say the profit and loss account shows it was closed out? A. Yes.

Q. Let us turn to that, so I can get that clearly in my mind.

A. You see here, transferred to E. W. A. Peake \$10,000; to C. L. Boss, \$11,373.32; to surplus ac-



(Testimony of B. B. Weldy.)

count, \$1,373.32. It closes up the whole thing. There is nothing to carry over at all.

Q. Profit and loss account never does carry your merchandise articles, anyway, does it?

A. Not necessarily, no.

Q. No. A man might close out a profit and loss account and still have an inventory there of many thousand dollars? A. Sure, they can do that. [105—30]

Q. Now, what I am getting at, was the merchandise carried over into profit and loss?

A. The merchandise account will show that.

Q. Well, that is what I am getting at.

A. I don't know where it is now. Here is the merchandise account. That doesn't go that far. Miscellaneous stock. There doesn't seem to be any division here. The books were not closed. Here is a demonstrator car, for instance, taking as total of \$837.86 as May 31, 1917, and the account continues on. I think the whole thing is the same way right straight through; that they were not closed. We frequently find that in our examinations.

Q. Isn't it a matter of fact that all of the accounts in there, with the exception of profit and loss account and E. W. A. Peake's personal account, continued right straight along after the 31st of May?

A. I won't say one way or the other, but I presume they were.

Q. All you have seen, all you find there, that is what happened, wasn't it?

(Testimony of B. B. Weldy.)

A. Naturally; there's lead pencil figures.

Q. Now, is there anything there in those books to distinguish between the business of Boss & Peake Automobile Company and the C. L. Boss Automobile Company?

A. Well, what I went by was the profit and loss accounts for the two concerns, one up to the 31st of May, and the other from June 1st to the end of the year. And all the way through here the pencil figures show the amount at May 31, 1917.

Q. Is there anything to indicate when those pencil figures were put in there?

A. Usually at the end of the month? [106—31]

Q. At the end of each month, aren't they?

A. Yes, they are at the end of each month.

Q. Now, let me ask you this further question: In determining whether or not that was the net profits of that concern, the profit and loss account would not accurately show it unless you knew whether the merchandise accounts at the end of the time were greater than they were at the beginning?

A. Where is that black book? This shows May 31, 1917, the inventory on hand—the goods on hand.

Q. Yes, that shows the goods on hand. Now, then, where is the date on that? A. May, 1917.

Q. Is there anything to indicate there the date upon which these entries were made?

A. Not any more than May.

Q. Than May on the opposite page?

A. Yes. Here is June, 1917, page 160.

Q. Now, then, is there anything to show what the

(Testimony of B. B. Weldy.)

merchandise accounts were on the first of January, 1917?

(Objected to as incompetent. This is an income tax on profit, not on merchandise, and this account shows the profit.)

Mr. MAGUIRE.—I have spent a good deal of time the last three or four years trying to find out how to make income tax returns.

COURT.—I understand you to contend that the profit and loss account does not accurately show the profits?

Mr. MAGUIRE.—It is not a reflection of income. Under the system of accounting adopted by the Government, a profit and loss account is not any data at all. If you are selling merchandise, you have your inventories as of the time of the [107—32] beginning of a period, your purchases in the period, your inventories at the end of the period.

COURT.—Notwithstanding, the Government has through this witness determined the income account from profit and loss.

Mr. MAGUIRE.—It is guessed at, your Honor. That is exactly what we are getting at.

A. When the profit and loss is in balance we very seldom question it, and we take that as our starting point. Now, here is inventory 11/25, 1916, showing what Boss & Peake Automobile Company purchased from C. L. Boss & Company. It was not necessary to have an inventory at the beginning of the period, because it was all purchased, and it would have been just the same if it was all purchased in one day

(Testimony of B. B. Weldy.)

from C. L. Boss & Co. or Hudson Motor Car Company, or any other concern, or whether it was purchased during the period that the corporation was in existence.

Q. What I am getting at is this, Mr. Weldy: When the corporation started in the business, it set up the amount of its merchandise on hand, didn't it? A. It should have.

Q. Isn't that what it did?

A. This purports to be.

Q. Now, does it also show up here the amounts of purchases since that first entry?

A. Well, I couldn't tell you whether it does right in here or not; but the merchandise accounts and the car accounts showed each car, or each transaction.

Q. Did they show the parts?

A. There is a parts account here, is charged to purchases during the period, but the books were not closed as stated before December 31, 1916, so the only way we could do would [108—33] be to take the amount necessary after deducting the expenses. We knew the expenses, and we knew the profit that they had estimated or set up as being \$604 and some cents, and by taking the amount necessary to make the income reflect that amount of net profit, that is the difference, and the only thing that I guessed at—

COURT.—You explained that a while ago.

Q. That is merely an arbitrary figure that you assumed, wasn't it?

(Testimony of B. B. Weldy.)

A. Naturally so. You couldn't get at it any other way.

COURT.—That is the only way he could get at it.

Mr. MAGUIRE.—I know. But if he could take one arbitrary figure, your Honor could take another, and I could take another, and each of us would be equally right.

COURT.—I presume the Government had a right to do that from the books, if the books were in such shape they couldn't arrive at it accurately and absolutely; that they did have a right, not to take an arbitrary account, but to take what evidence they could get at in order to determine as nearly as possible what the real figure ought to be; and that is what they did?

A. Yes, sir. Now, there is no question but what the Boss & Peake Automobile Company filed a return covering the period from November to December 31, 1916, because they paid a tax on it. We have no record of it. All the returns are sent in from this office, from the collector's office, to Washington. And it also shows some place that there was a "No tax" income tax return filed for C. L. Boss Automobile Company later, covering the period from January 1 to May 31, 1917.

Q. No tax? A. No tax. [109—34]

Mr. MAGUIRE.—Well, now, just a moment. If Boss & Peake Automobile Company made a return for 1916, that return had to be made through your office, didn't it?



(Testimony of B. B. Weldy.)

A. No, sir. We have nothing to do with the collector's office at all.

Q. Oh, I misunderstood the situation.

A. It was filed in the collector's office, but we are the revenue agent's office, and have nothing to do with the collector's office.

COURT.—Now, again, what was the date the Boss & Peake Automobile Company came into existence?

A. In November, 1916. The corporate period was from November 8th, but they did not take over the business of C. L. Boss & Company until November 26th, I believe, 25th or 26th.

Mr. LOGAN.—25th, if you will permit me.

COURT.—As far as your return shows, that corporation continued until what date?

A. Until May 31, 1917.

COURT.—I understand it now.

Q. Just a minute, Mr. Weldy: Do you know when that corporation dissolved? A. Yes.

Q. When? A. In June, 1917.

Q. What date in June? A. The 17th, I believe.

Q. No, is there any difference there in the way those books are kept from the 1st of June up to the 17th? A. No. It is not necessary.

Q. I didn't ask you that. I asked you whether there was any. A. No, I have said. [110—35]

Q. Now, then, how much parts did they have on hand there on the first of June?

Mr. SMITH.—Objected to as incompetent, irrelevant and immaterial.



(Testimony of B. B. Weldy.)

COURT.—I think you better prove that independently.

Mr. MAGUIRE.—Well, I cannot, your Honor. These are not our books; we didn't have charge of them—haven't got charge of them.

Mr. LOGAN.—We are willing to let you have the books. Your witness, Mr. Murphy, is the man who kept the books. You can have Mr. Murphy go over them.

Mr. SMITH.—It is incompetent, irrelevant and immaterial in this case, because the Government is only suing for income tax down to May 31st. Now, if the Government has a greater demand, it is not involved in this case. It stops on June 1st, whether the corporation was dissolved or not.

Q. The question was, how much merchandise in parts did they have on the 1st of June?

(Objected to.)

A. I cannot tell you.

Q. Can't you give us the value of it? Doesn't that reflect in the books?

A. It may be reflected in the books; but if it is reflected in C. L. Boss Automobile Company as a purchase, it was not necessary for the C. L. Boss Automobile Company to set up an inventory as of June 1st, 1917, when they began business, because they purchased this stock.

COURT.—He has been over that.

Q. Now, where does it show that C. L. Boss Automobile Company purchased any parts? That is what I am getting at. [111—36]

(Testimony of B. B. Weldy.)

A. I don't know whether I can show you that or not. I am not familiar with these books.

Q. I am afraid you are getting the idea I am trying to get you. I am trying to get facts.

A. Understand I didn't keep the books.

Q. No, I know you didn't. I am not holding you responsible for it.

A. I cannot tell you anything about it.

COURT.—I think if you have a witness of your own who is familiar with those books, you better produce him.

Mr. MAGUIRE.—I haven't, your Honor.

COURT.—It has been suggested that you have.

Mr. LOGAN.—Mr. Murphy, your witness, kept those books.

A. I am not familiar enough with these books to show these things. I was not interested in it at that time.

Q. I won't ask you to take that trouble. I notice here in your list of deductions from the gross sales that there is nothing allowed there for salaries of the officers. How did you handle that, Mr. Weldy?

A. There is allowed for salaries of officers \$2008.34, which is all they claimed.

Q. That is not part of the \$15,526.36, is it?

A. Yes. It is the second item.

Q. My items are \$659.47, \$1017.90—

A. Those are expense accounts. That does not necessarily take in the officers.

Q. That is what I am getting at.

(Testimony of B. B. Weldy.)

A. That is charged to another expense, general expense, I think, in this book, or in the profit and loss it was general expense. I segregated it, and allowed the officers \$2008.34, [112-37] which was all they claimed.

Q. Was that \$2000 taken out of the net income?

A. Oh, yes.

Q. What was the amount that you allowed there?

A. It was \$2008.34.

Q. That was the total?

A. Yes; at the rate of \$175 a month, I believe. There was six weeks in 1916 and five months in 1917. I think it will figure out right.

Q. There was still a net income of \$22,549.94 after allowing all that? A. Yes, sir.

Q. Now, then, did you call Mr. Boss' attention to the fact that there had been no corporate return made? A. I did.

Q. Was that before or after he had made a partnership return?

A. Oh, he made a partnership return in 1918, covering the period from June 1st to December 31, 1917.

Q. Now, your examination was made in February, 1920? A. Yes, sir.

Q. Did you make any inquiry of Mr. Peake as to the facts with regard to this matter of the taxation, or the figures of taxation, or the transaction between these parties?

A. I did not. I never saw Mr. Peake until today.

(Testimony of B. B. Weldy.)

Q. The information you got you obtained through Mr. Boss?     A. And the books.

Q. And from the books themselves—I see.

(Questions by Mr. LOGAN.)

Q. I notice Mr. Boss signs this return as one of the stockholders, or part stockholder. What explanation did he make [113-38] to you at that time?

Mr. MAGUIRE.—That wouldn't be competent, your Honor,—a self-serving declaration.

COURT.—Did he talk to you at that time?

A. Yes, sir.

Q. You had seen him sign this, did you not?

A. Yes.

Mr. LOGAN.—This is a government's exhibit.

COURT.—You may answer that question.

(Exception allowed.)

A. That the corporation had been dissolved; there were no officers.

Q. Now, you stated that they drew a salary from the 25th of November, 1916, down to the 31st of May, 1917?     A. Yes, sir.

Q. Did you find any place in the books where that was set forth?     A. I couldn't say right off.

Q. I call your attention to this account right here—I believe in Mr. Murphy's handwriting—salary account. What about that? Did you see these items here?     A. I did; yes, sir.

Q. Did you see this item here—"E. W. A. Peake, Capital Account, \$15,000"?     A. Yes, sir.

Q. Did you see Ditto "Salary Account, \$1079?"

(Testimony of B. B. Weldy.)

A. Yes—81 cents, I think, or 51; something like that.

Q. Did you see this item here, Ditto “Earnings \$11,255.31”?

Mr. MAGUIRE.—That is the same matter you went into before, the Court said it was improper. [114-39]

A. Yes, I looked all over those.

COURT.—Let me ask you another question, to clear up my mind.

(Examination by the COURT.)

Q. This return was made by Mr. Boss as a corporate return? A. Yes.

Q. And not a partnership return?

A. No, no. Corporate return.

Q. The corporation ceased to exist on May 31?

A. Yes, sir.

Q. And this return runs down to June 1st?

A. This return was made out March 1, 1920, after I got through with my examination.

Q. It included the period of time from January 1, 1917, until June 1?

A. No, just including May 31st.

Q. May 31st? A. Yes, sir.

Q. That is the date, now, that the corporation turned over its property?

A. Mr. Boss told me at that time it was after business hours, if I recollect right, on May 31st, and it was of June 1st; but frequently, where we find just a day or so, we close with the end of the month.

(Testimony of B. B. Weldy.)

Q. That the assets or the property of the corporation were turned over to—

A. C. L. Boss Automobile Co., yes, according to my information.

Q. That is all.

A. Now, in this case, to explain, where we find that there was return made, then we get an amended return. That is what this is. And we also got a return that Mr. Boss signed as a delinquent return covering the excess profits tax. [115-40]

COURT.—Yes, I understand that. It is for that period? A. For that period, yes, sir.

Mr. MAGUIRE.—Where did you get the information that on June 1st these assets were turned over to the partnership? There isn't anything on the books to show that, is there?

A. I took Mr. Boss' word for that, I believe.

Mr. MAGUIRE.—Then we move to strike that testimony from the record as being hearsay.

Mr. LOGAN.—We will connect it up, your Honor. If we don't, it may be stricken.

COURT.—The Court won't consider incompetent testimony. I was trying to find out the exact period covered by the return.

Mr. MAGUIRE.—Oh, I see what your Honor had in mind.

#### Redirect Examination.

Q. Do I understand that you had, previous to February, 1920, made an examination of the books of the C. L. Boss Automobile Company?

A. No, sir, I think that was later. That was



(Testimony of B. B. Weldy.)

after I made the examination of Boss & Peake Automobile Company. But it was all at the same time, and my recollection is that I made examination of Boss & Peake Automobile Company first, and then C. L. Boss Automobile Company later.

Q. Well, but the examination that you made of the C. L. Boss Automobile Company, was it for the period both preceding and following the time of the business of the Boss & Peake Automobile Company, or for only one of those periods?

A. Oh, just following.

Q. Following? A. Yes.

COURT.—That is, beginning June first? [116-41]

A. June 1st, and continuing that year and the next year. We were only making examination for 1916, 1917, and 1918 at that time.

Mr. HUMPHREYS.—That is all.

Mr. SMITH.—There is one entry I wanted to call to the attention of the witness, if the Court please, a question brought out by a question of Mr. Maguire's, as to whether these books showed the date as of which these entries were made when the matters were closed.

(Examination by Mr. SMITH.)

Q. I call your attention to this combined cash and journal, page 120, the items "ditto" beginning with "E. W. A. Peake, Capital Account, \$15,000." Immediately under that "Do Saly a/c."

A. Salary account, \$1079.17.

Q. Immediately under that "Do"—

COURT.—You have been over that, haven't you?

(Testimony of B. B. Weldy.)

Mr. MAGUIRE.—Three times now.

Mr. SMITH.—No.

Mr. REILLY.—They have asked the witness “Did you see this?” Now, they are asking him of what date it is in the book. The book speaks for itself. The witness has been over it time and time again.

Q. What I want is the “Earnings 11/25 to 5/31, \$10,000.” Was that in there when you examined it? A. Yes, sir.

Mr. MAGUIRE.—There is no subdivision made there from that date on, is there, in your combined cash book and journal, or in your ledger sheet? A. No, sir.

Excused. [117—42]

Mr. HUMPHREYS.—If your Honor please, counsel are willing that whatever evidence either of the defendants may introduce touching the question of actual dissolution of the corporation may be considered part of the Government’s case. I rest, with that understanding.

COURT.—I suppose you would be entitled to that anyway.

Mr. HUMPHREYS.—Very well, your Honor.

COURT.—As part of this case.

Mr. HUMPHREYS.—Under the theory of the complaint, I ought to make some kind of showing about that. I don’t want to do that, because I don’t want to attempt to put on part of Mr. Logan’s case. I don’t want to attempt to put on part of Mr. Maguire’s or Mr. Reilly’s case.

COURT.—Very well. That will be very satisfactory. It will relieve the parties of duplication of testimony.

Mr. HUMPHREYS.—Yes, your Honor. Then the Government rests at this time.

COURT.—Very well.

Adjourned until 10 A. M.

Government rests. [118—43]

Portland, Oregon, May 23, 1922, 10 A. M.

**Testimony of C. L. Boss, in His Own Behalf.**

C. L. BOSS, called as a witness in his own behalf, being first duly sworn, testified as follows:

Mr. REILLY—If the Court please, we were given an opportunity to inspect the books of the Boss & Peake Automobile Company last night, and we find missing from them the capital account; the account of C. L. Boss, capital, and the account of R. J. McRel, capital, and we wish to make demand upon the defendant Boss and the defendant Boss & Peake Automobile Company to produce those sheets from the ledger. They are referred to elsewhere in the books, so that there cannot be any doubt of their having been in there.

COURT.—Do you object to that?

Mr. SMITH.—No. We will produce everything we have. The books are in the same condition they were when I came in the case day before yesterday.

Mr. LOGAN.—We will produce all sheets available to us. I don't know whether we have those sheets or not.

(Testimony of C. L. Boss.)

COURT.—The Court will make the order to produce them as far as you can.

Mr. LOGAN.—I would like to have produced here all the papers Mr. Peake has with reference to negotiations between himself and Mr. Boss—particularly the check which he gave to C. L. Boss Automobile Co. on the first day of June, 1917.  
[119—44]

### Direct Examination

(Questions by Mr. SMITH.)

Mr. Boss, in giving your testimony you will find frequently that the passing street-cars make a lot of noise, and it is a little hard to understand in this room. Please speak up plainly. Kindly state your name.

A. C. L. Boss.

Q. Where do you reside, Mr. Boss?

A. 374 Multnomah Street.

Q. And your occupation, please?

A. Automobile dealer.

Q. How long have you been in that business?

A. Since November, 1911.

Q. Where have you been in that business since that time? A. At 615-617 Washington Street.

Q. Here in Portland, Oregon? A. Yes, sir.

Q. When you first started in business, Mr. Boss, were you in a partnership or a corporation?

A. Partnership.

Q. What was the name of it?

A. C. L. Boss & Company.

(Testimony of C. L. Boss.)

Q. How long did that C. L. Boss & Company continue in business?

A. Until November, 1916, when the corporation of Boss & Peake Automobile Company started in business.

Q. Now, when the Boss & Peake Automobile Company started in business, you were one of the stock subscribers, I believe the pleadings admit?

A. Yes, sir.

Mr. SMITH.—I will state, if the court please, the pleadings admit that Mr. Boss had 149 shares and Mr. Peake 149 shares, and there were two other shares owned by [120—45] individuals, that are immaterial in this case. Those shares were of the par value of \$100 each.

COURT.—Very well. It is not necessary to prove that further.

Q. Now, in the organization of the Boss & Peake Automobile Company, how was your capital stock paid for? A. Paid for in cash.

Q. And how was Mr. Peake's paid for?

A. Paid for in cash.

Q. What transaction did the Boss & Peake Automobile Company have with the old C. L. Boss & Company in regard to acquiring some of its stock or automobiles or merchandise?

A. After the Boss & Peake Automobile Company put up this \$30,000 they purchased the live, going assets of C. L. Boss & Company. They didn't purchase the old book accounts, or the old used cars. They bought the new automobiles, furniture, fix-



(Testimony of C. L. Boss.)

tures, tools, and such live merchandise, everything that the institution had with the exception of the old notes and accounts, and the old liabilities and the old second-hand cars. They started in business in the same building, with the same force, and it was like staging another play in the same opera house. The business that had been worked up on account of the Super Six automobile, which then dominated in the market, continued good from the start, as shown by the Government report. We made money in the winter-time in the automobile business, which is exceptional, and made money from the start right through.

Q. With the Boss & Peake Automobile Company?

A. With the Boss & Peake Automobile Company.  
[121—46]

Q. How long did the Boss & Peake Automobile Company stay in the automobile business itself?

A. Until May 31, 1917.

Q. That is approximately seven full months, or six months?

COURT.—Until May 31st? A. May 31, 1917.

Q. Did the Boss & Peake Automobile Company quit selling automobiles and practically cease business at that time? A. Yes, sir.

Q. Now, I wish you would tell the court, in your own way, the circumstances under which the Boss & Peake Automobile Company ceased selling automobiles and ceased carrying on its business. First, let's get back a little of your own management of your corporation to show the Court the situation



(Testimony of C. L. Boss.)

there. After you and Mr. Peake became associated, what part of the business did he look after, and what part did you look after?

A. I attended to the part of buying and selling automobiles. I went to the factory and negotiated a contract, and promptly on return of my stock in the factory we put up the money, \$30,000, \$15,000 each, and took over the live assets of C. L. Boss & Company, and continued in business right along from that time. The old company had a good organization of dealers throughout the State. These dealers we signed up on the contracts, which is customary, new contracts each year, at the beginning of the fiscal year. We closed up—what is called closing up the territory, allotting each dealer his territory, making contracts in triplicate, which were sent on to the factory for their approval, and then they were returned to us, the factory keeping one copy, we keeping one copy, and the dealer keeping one copy. We continued at that time selling automobiles at retail, and [122—47] the business remained very active in the winter on account of the dominating car, the Hudson Super Six.

Q. Now, what part did Mr. Peake have to do in the management and the active work of carrying on the business?

A. Mr. Peake, according to agreement, was to finance the automobile business, and he practically took charge of the office, directed the bookkeeping and handling of the finances of the corporation.

Q. Did he have charge of the office force?

(Testimony of C. L. Boss.)

A. Yes, sir.

Q. Now, before Mr. Peake went in with you in the Boss & Peake Automobile Company, before the corporation was formed, did you and he have any talks about what you would do in case you could not get along well, or how you would divide the assets and split up or quit?

A. There were many negotiations before we entered the business. The different points were taken up between us, and there was a verbal understanding between us that there would be no obligations assumed that we could not at the end of the year, or such time as we decided, dissolve and distribute our assets, that there would be nothing that would stand in the way of our dissolving or ceasing to be and do business together. The matter was taken up in such a way that I was to furnish \$15,000, Mr. Peake was to furnish \$15,000, and personally he would, if he chose, finance the business personally out of money that he wanted to loan to it, or else we would borrow money from the bank. That was optional with him, but he agreed to furnish up to \$50,000 in case that we necessarily required it. Now, in the automobile business, in order to make a success of the business, a person has got to have a flow of automobiles continually, and the contracts with the dealers were very full. [123—48] The dealers' wants were large, and they were taking cars in the winter time, as well as delivering them here, and so, feeling that we had a good thing, I ordered automobiles to take care of the business,

(Testimony of C. L. BOSS.)

based upon that judgment and experience of an automobile dealer. These automobiles came in—

Mr. REILLY.—I object to this as not responsive to any question.

COURT.—I think it is covering this question rather elaborately.

Mr. SMITH.—Very well.

Q. Now, after you and Mr. Peake were associated in November, and about the following March, did you have any talk with him about dissolving or quitting your association with him and distributing the assets?

A. We had a number of conversations in which I asked Mr. Peake to allow me to run the business along the lines that we originally laid out.

Mr. REILLY.—Objected to as not responsive to the question. I move that it be stricken.\*

COURT.—Just answer the question as directly as you can without going into explanation.

Q. (Question read.)

A. It was a little later than that that the distribution and the dissolving came in.

Q. Tell how that came up, and tell us all about the conversation with him then at the time he refers to.

A. Mr. McCornack, the Field Manager of Husdon Motor Car Company, made a trip here to the coast, and during Mr. McCornack's trip Mr. Peake came to the depot and met Mr. McCornack in the presence of Mr. McRell and myself. And [124—49] while there at the depot Mr. Peake made overtures

(Testimony of C. L. Boss.)

to Mr. McCornack to get the Hudson contract, and Mr. McCornack asked Mr. Peake what he did in the business; and after Mr. Peake had explained, he said, "I understood you to be a financial man, and as a financial man I think your time would be worth more than what you have done in the business." And Mr. Peake made representations, and Mr. McCornack said that if Mr. Peake quarreled with me he would not be quarreling with me, he would be quarreling with the Hudson Motor Car Company. After Mr. McCornack left to board the train, I turned to Mr. Peake and I said that I noticed that he was blocking our distribution, our dissolution and distribution again, and he said, "How so?" I said, "By taking the cash of the corporation and putting it in notes that the bank was carrying"; and Mr. Peake said, "I will take notes, title notes on all the new Hudson cars, so that the distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation, and sell them to you boys, and take the title note, and loan you boys the money on the very automobiles so that the dissolution and distribution can be completed."

Q. At that time what other thing was said, if any, as to how you would arrive at what sum he should be paid?

A. Mr. Peake said, "In doing so I must have my salary; I must have my capital, and I must have my net profit, which I estimate—the net profit I estimate to be \$20,000 after allowing over \$2,000 for

(Testimony of C. L. Boss.)

profit and loss on the notes that were indorsed, the service on the cars that were out, and the incidental bills that were not in. Experience had taught us by keeping record of the business constantly—[125—50]

Mr. REILLY.—Objected to, as the voluntary statement of the witness is not responsive to the question; merely argumentative; not a statement of any fact.

COURT.—Just answer the questions.

Q. You state, Mr. Boss, that he asked for his salary, his capital and his net profits.

A. His estimated net profits.

Q. You have already told about the cars. Now what about this salary. How was that arrived at, and in what way had it been carried on the books, if at all?

A. Mr. Peake had had Mr. Murphy credit himself and myself a salary.

Q. How much?

COURT.—Who was Mr. Murphy?

A. Our bookkeeper. It was not authorized by the corporation; had never been authorized; and I wanted to draw my salary, and because it was not authorized by the corporation I felt as if I could not draw it.

Mr. MAGUIRE.—Pardon me, Mr. Boss. It is utterly impossible to hear you over here.

A. I am afraid I am hollering at the Judge.

COURT.—Raise your voice so they can hear. They have a right to hear.



(Testimony of C. L. Boss.)

Q. Did you agree to that with him, to allow the salary?     A. At the depot.

Q. At the depot; in this settlement and distribution?

A. His proposition that he put forth was accepted; and at the time that it was put forth I said, "As of June 1st." This was May 21st. [126—51]

Q. 31st, wasn't it?

A. No, the proposition made at the depot was May 21st; either May 21st, May 22d, or May 23d; and in checking back and looking at the calendar I think it was May 21st.

Q. Anyway, you accepted the proposition that he made?     A. Yes, sir.

Q. Now, what did he mean by withdrawing his capital? What sum was agreed upon for that?

A. The \$15,000 that he put into the business; the salary that was credited.

COURT.—That he put into the business—he or we?     A. That he put into the business.

Q. And you say he spoke of his part of the net profits?

A. His estimated net profits. The estimated net profits, that he himself estimated.

Q. Were you with him when he made that estimate?

A. The estimated net profits were brought about—were taken from preliminary statements, supplementary statements, that we carried from time to



(Testimony of C. L. Boss.)

time. Now, then, if you let me explain that, I will take the book and explain it.

Q. I will ask you to explain to the Court what you mean by those supplementary statements, and to take whatever book—which book do you wish?

A. I want to take the ledger there—that one with the papers in. A carload would be shipped from the factory, and it would be entered under the Hudson Motor Car account. For example, on February 23, 1917, a carload of four Hudson automobiles was shipped, arrived here on April 2d; paid for in cash for \$4829; carried on the other side of the [127—52] account by the number of each automobile, and the man's name it went to.

COURT.—How much was the price?

A. Of the carload? The factory price was \$4829.90. Now, then, those automobiles—four automobiles to a carload.

Q. Now, there would be another account called the sundry account, and each one of those automobiles that appear under this number and name would be entered in the sundry account?

A. This carload was sold to Mr. Skinner, Mr. Croeni, Mr. William Cornfoot and Mr. Stolte. Against each one of these automobiles was charged the unloading charge, the freight, the commission to the salesman, the gas and oil in servicing it, and every item that entered into that. If it was a used car, the used car was charged, and the expenses on that. On this carload that they had in question, the records show we made \$212.29 on the

(Testimony of C. L. Boss.)

automobile that went to Mr. Skinner. We made \$236.02 on the automobile that went to Mr. Croeni; to William Cornfoot we made \$385.39; and to Mr. Stolte we made \$283.16.

COURT.—You made that net, after taking out the overhead charges?

A. Expenses; yes, sir. Now, then, those amounts were thrown into another account called Super Six merchandise, and they are itemized right down here in a row. Now, then, by taking the automobiles as they came there and were delivered, and having the individual profits on each automobile, this account showed there was a profit made on Hudson Super Six cars. The Maxwell accounts the same way, profit on Maxwell automobiles. In addition to those accounts, we also had [128—53] accounts where we would go out and pick up parts, and we had a record of that, and that would show; and then we had a factory parts account; and that would show the profit on it. Then we had a shop, and that would show the profit on it. And we had —if you will get me the other book, please.

Q. What book is this I now hand you?

A. Journal.

Q. What book have you been referring to?

A. Ledger.

Q. Now, referring to the journal, continue your explanation as showing the facts you took into consideration.

A. The different accounts on which a profit was ascertained as we continued in business, were the

(Testimony of C. L. Boss.)

Super Six merchandise account, the Maxwell merchandise account, Accessory account, factory parts account, gasoline and oil account, miscellaneous stock account, shop, and tires.

Mr. REILLY.—What page are you referring to?

A. That is page 159—a of the Journal.

Q. Do you have a corresponding entry of the expenses in this same book that you are just referring to?

A. Yes; in the ledger we kept our expense account, advertising expense; that was subdivided. Then general expense, demonstrator expense, territory expense, insurance, membership, subscription, postage, service, stationery, storage, telegraph and telephone. Those expenses were altogether different from freight, commission, gas, and oil that went into the car. So that by keeping the supplementary statements taken off from our books from time to time, we would know at all times, that is, weekly, or semi-weekly, or daily, if we wanted it, just where we stood. I [129—54] had a large package of those supplementary statements, the final closing statements and memoranda attached, which I delivered over to the Federal people when they came in to check the books, Mr. Butterfield and Mr. Weldy. He remembers I never received them back again. I don't know where they have gone.

COURT.—You have some copies in your books there, haven't you, supplementary statements you have just referred to?

(Testimony of C. L. Boss.)

A. Supplementary statements were taken from these records. You could take it—at any time you could draw it off. We kept those supplementary statements at all times so we could tell where we were at.

Mr. REILLY.—They are not in the books, supplementary statements?

A. No; they were delivered over to Mr. Weldy, the Government official, and all my memoranda and all my finishing statements were turned over to the Government—Mr. Butterfield and Mr. Weldy had them—when they came in to check our books. I said, “Here they are, and here is the room”; and all the office force was at the service of the Government. Everything we had was turned over to them; and I didn’t get them back again.

Q. Well, now, then, Mr. Boss, will you tell us, please, which books, which accounts, what statements you and Mr. Peake went over together in getting at this estimate of \$20,000 profit, and of which you say he got half and you half?

A. Just before we met at the depot this record was brought up and this record showed a little over \$22,000 profit. [130—55] Mr. Peake said at the depot he estimated there would be \$20,000 net, that allowing for the running service that we gave on automobiles that were delivered, current bills that could not be kept in there because they were not in, and the expense on the assigning of these notes that we had sold to the Western Bond & Mortgage Company and the bank. The profit and

(Testimony of C. L. Boss.)

loss on those accounts would leave, taking that off, would take it down so there would be \$20,000 net.

Q. Now, these books that you have referred to, are those the regular books of the Boss & Peake Automobile Company corporation? A. Yes, sir.

Q. And these entries that are referred to, do you know who made them? A. Mr. Murphy.

Q. He was the regular bookkeeper.

A. Who was acting for the Boss & Peake Automobile Company during that entire period of its existence.

Q. In whose handwriting are these pages to which you have referred, page 159-a and 159-b?

A. Mr. Murphy's, the closing entries of the Boss & Peake Automobile Company.

Q. Now, in whose handwriting were those entries made to which you referred a few minutes ago in explaining to the Court the method of keeping the books of the shipment from the factory, and the distribution to the purchaser?

A. That was his—some of these are his, and these filling in statements here are nearly all his; and there is some of the freight that is put in by Miss Healy, that used to work for [131—56] him as his assistant.

Q. What I am after is, whether all of these entries to which you have referred are regular entries by the regular office force of the Boss & Peake Automobile Company? A. Yes, sir.

Q. Now, Mr. Boss, following that conversation with Mr. Peake, you say you accepted his terms for



(Testimony of C. L. Boss.)

the dissolution and distribution?      A. Yes, sir.

COURT.—Now, what were those terms; state it again.

A. He said, “I must have my salary.” You see, it had never been authorized. “I must have my capital, and I must have—”

COURT.—That is the \$15,000?

Mr. SMITH.—Yes, your Honor.

A. “And I must have my profits, which I estimate in the business to be \$20,000, \$10,000 to each.” And I said, “As of June 1st?” And he said, “Yes.”

Q. Do you remember what the amount that he claimed totaled? What did it add up to?

A. That was, in the transaction we took the desk and the chair, and the total amount was \$26,137 and some cents.

Q. Now, was there any entry made in this book which I now hold, the combined cash and journal, of how those sums were made up?

Mr. REILLY.—The entry you are about to read from is under date of June 2, is it not?

A. Yes, sir; it is.

Mr. REILLY.—We object to any attempt being made to establish anything as binding upon Mr. Peake from entries made after he had sold his stock and had no more connection [132—57] with the corporation.

COURT.—I will hear the testimony.

Q. Now, just answer the question. Go right ahead; tell us whether the entries are made in this



(Testimony of C. L. Boss.)

book. If so, where? Refer to them, and explain them, please. What page are they on?

A. This entry was made in June to cover the distribution which was made in cash to Mr. Peake to account for the check that was issued at that time; and it says, Mr. Peake's capital account.

Mr. REILLY.—What page? A. 120.

Mr. REILLY.—Combined cash and journal?

A. Yes, sir. And it says his salary and his chair and desk, and it says the net earnings from November 25th to May 31st, during that entire period, in the bookkeeper's handwriting, made at that time; and this salary account is in the balance; this salary account is in the balance of May 31st.

COURT.—Let me see that.

A. Mr. Peake's capital account; salary account; little chair here, and the desk; and his net earnings, November 25th to May 31st, to cover the check of \$26.137.

COURT.—To cover the check?

A. Well, of distribution which was made June first.

COURT.—Well, did C. L. Boss & Company deliver to him a check?

Mr. SMITH.—Yes, I was just going to ask that, if the Court please. This calls for twenty-six thousand some odd dollars. [133—58]

A. The Judge wants one thing before that; this is in the balance of May 31st.

Q. First, that the salary was in the balance?

A. Yes, the salary was in the balance, before it

(Testimony of C. L. Boss.)

was ruled off, as of this date. Here is June 2d, in the book, and it is in the balance of May 31st.

Q. To what page are you referring now; what page of what book?

A. This is loose-leaf ledger, E. W. A. Peake's personal account that salary was in.

Q. Now, let's take up the next question that the Court asked: Whether there was a check given for this \$26,000? A. Yes, sir.

Q. Have you it with you? A. Yes, sir.

Q. Produce it, if you please.

COURT.—That didn't include the capital stock that you sold? A. Yes, sir.

COURT.—Which—the \$26,000?

A. Yes, sir; there was no capital stock ever sold. The capital stock was indorsed at my request as a means or a way. When we were down there, he made a proposition of dissolving and distributing either in cash or kind, and his proposition was accepted. And then when we went to the bank on June 1st, during banking hours, in order to perfect his own proposition in his own way, he took the physical assets of the corporation prior to this transaction, and took the notes on them, title notes, sold them to a copartnership, it was understood, and gave his check of \$9,600. [134—59]

Mr. SMITH.—We now ask for that check, if the Court please.

Mr. MAGUIRE.—It is there.

COURT.—When that was done, then he surrendered his capital stock, did he? A. Yes, sir.

Mr. LOGAN.—For what purpose did he surrender it?

Mr. REILLY.—Objected to. This man cannot say what somebody else's purpose in doing a certain thing was.

COURT.—You just tell the fact.

Mr. LOGAN.—What was the understanding between them?

Q. Where did you get your stock from?

Mr. LOGAN.—What was the purpose?

Mr. REILLY.—That is the same objection. Fact is fact. The purpose of it is matter of argument, a matter of witness' conclusion. The purpose is a matter for your Honor to determine from the facts.

Mr. LOGAN.—We desire to show that on the very next day Mr. Peake knew that the corporation was dissolved; knew that it was to be dissolved and that the transfer of the stock was in order to give them the majority of the stock, because Mr. Boss could not dissolve that corporation without a majority under the law. And the very next day Mr. Peake dealt with the partnership, as we will show you in a moment. He gave a check to Boss & Peake Automobile Company—

COURT.—You are getting away from the question I asked. It has been stated here that Mr. Peake sold his capital stock and disposed of it so that it went into the hands of Mr. Boss. Now, what I was getting at was, What was paid Mr. Peake for his capital stock? [135—60]

Mr. SMITH.—All right; \$15,000.

(Testimony of C. L. Boss.)

Mr. MAGUIRE.—Just a moment. Let the witness answer.

COURT.—I understood the \$15,000 was to reimburse Mr. Peake for money that he had advanced to the institution.

A. No, no. No, not at all.

COURT.—That is what I want straightened out.

Q. Let's get that clear, Mr. Boss, as to what you say Mr. Peake's proposition was. What items did it involve, in what amounts? First, the salary—what was that?

A. It was credited on the books at \$175 a month from the time the corporation started up until June 1st. It hadn't been authorized or hadn't been drawn.

Q. Do you know what that amounts to?

A. The balance was \$1,079; but he had had some gasoline charges, minor charges on his account, that made the balance \$1,079. I didn't figure it out, whether \$175 a month equaled just that; but the deal was that "I must have my salary."

COURT.—Mr. Peake?

A. Yes. "I must have the capital, and I must have my net earnings."

Q. In what sum was the capital fixed and why? He said, "I must have the capital." How much was the capital?

A. That capital was the amount of money he originally put in to the business in taking up his half interest of the stock.

Q. \$15,000?      A. \$15,000.

(Testimony of C. L. Boss.)

Mr. REILLY.—Par value of 150 shares of stock?

A. Yes. [136—61]

Q. And you have explained how you got at the estimated net profits? A. Yes.

Q. The total was \$26,137.15, was it? A. No.

Q. What else was included in that, if anything? You gave that before. What about the desk and the chair?

A. That belonged to Mr. Peake personally.

Q. And referring to this combined Cash and Journal, the entry to which I directed your attention at page 120 a while ago, can you tell what was the total amount that was agreed upon as being the sum in cash to be paid to Mr. Peake?

A. \$26,137.15.

Q. Was that paid to Mr. Peake? A. Yes, sir.

Q. In what way? A. By cash, by check.

Q. Is this the check that paid him?

A. Yes, sir.

Mr. SMITH.—We will offer the check in evidence, if the Court please.

No objection.

(Marked Boss' Exhibit "A.")

Q. The check is dated June 1, 1917, on the First National Bank, Portland: "Pay to E. W. A. Peake or order." Signed "Charles L. Boss." Endorsed, "E. W. A. Peake," and marked "Paid."

Mr. SMITH.—You admit, Mr. Reilly, that is Mr. Peake's indorsement on this \$26,000 check? [137—62]

Mr. REILLY.—I admit it.

(Testimony of C. L. Boss.)

Q. Now, prior to or at the time that Mr. Peake told you on what terms he would dissolve and quit, did you talk with him or tell him how you intended to go on with the business?

A. Yes. He inquired a number of times, which was brought about by the fact that he had Mr. McRell at luncheon.

Q. Did you discuss the formation of a partnership between you and McRell?     A. Yes.

Q. With Mr. Peake?     A. Yes.

Q. Were those plans then on foot for a partnership between you and McRell?     A. Yes, sir.

Q. Did you form a partnership?     A. Yes.

Q. Under what name?

A. C. L. Boss Automobile Company.

Q. Is that the present concern?     A. Yes.

Q. When did you form that partnership?

A. June 1, 1917.

Q. Did you sign articles?

A. We left the bank and went right over into Mr. Logan's office and signed the articles on June 1, 1917, declaring our intention.

Q. Are these the articles?

Mr. LOGAN.—Those are not the articles; that is an assumed name.

A. Yes.

Q. It is an affidavit of assumed name, showing assumption [138—63] of the name C. L. Boss Automobile Company, by Mr. Boss and Mr. McRell?

A. Yes.



(Testimony of C. L. Boss.)

Q. Let me have the check, please, that Mr. Peake gave; \$9,600 check I have been asking for.

Mr. SMITH.—We are offering this document, Mr. Reilly, together with indorsement, showing its due recording in the records of Multnomah County.

(Marked Boss' Exhibit "B.")

Q. Now, on this same day of June 1st, 1917, what transaction, if any, did you have with Mr. Peake about a \$9,600 advance from him to C. L. Boss Automobile Company?

A. In following out this offer and the acceptance of the offer to dissolve and distribute, he took all the new Hudson automobiles.

Q. How many in number?

A. Eight; and took title notes on them; and took the warehouse receipts showing possession on them, and sold them back to the new copartnership, C. L. Boss Automobile Company, and put up the money so that that could be used to complete the distribution and dissolution of all the physical assets at that time in either cash or kind. Here is one of these title notes, showing the warehouse it was in, signed by the C. L. Boss Automobile Company, the very property of the corporation before the distribution took place. Those eight notes, together with \$8,000 in cash that I borrowed on real estate that I owned, together with some of the cash that was in the treasury of the Boss & Peake Automobile Company, amounted to the \$26,137.15 given to Mr. Peake after he had sold us the automobiles. We took that money and gave it back to him [139—64] and as

(Testimony of C. L. Boss.)

the new copartnership didn't have a banking account it was run through my personal account at the bank so that we could have the distribution of all the physical assets complete at that time. And then following that time I walked right over to Mr. Logan's office with Mr. McRell and signed that statement of the C. L. Boss Automobile Company under assumed name at that very minute.

Q. Now, you stated what Mr. Peake took in this dissolution and distribution. What became of the balance of the assets of the Boss & Peake Automobile Company? Who got that?

A. The division would go to me; and I would have the liabilities and the assets of what was left after he had his capital, his net profits, and his salary. I would have mine in the stock and the accounts and the liabilities.

Q. What do you mean, stock in trade?

A. In merchandise.

Q. Yes, merchandise. I call your attention now to a check.

Mr. REILLY.—Aren't you going to put these documents in evidence he has been referring to?

Mr. LOGAN.—I called attention to that a few minutes ago.

Q. I call your attention now to a check dated Portland, Oregon, June 1, 1917, on the First National Bank, of Portland, Oregon. "Pay to C. L. Boss Automobile Company, or order, \$9,600." Signed, "E. W. A. Peake." Indorsed, "C. L. Boss

(Testimony of C. L. Boss.)

Automobile Company, Charles L. Boss." Marked "Paid."

A. This is the \$9,600 that he advanced the new copartnership; put into the hands, put enough money to dissolve the corporation in cash or kind; put into the hands of the new copartnership before we had signed that statement; acknowledged [140—65] us as a going concern, and here—

Mr. REILLY.—Object to this argument.

COURT.—That is not testimony. It is only conclusion.

Q. In whose handwriting is this \$9,600 check?

A. Mr. Peake's.

Q. What signature is there here, the drawer of the check? A. Mr. Peake.

Q. At that time had you had any conversation with him wherein you told him that McRell was going in with you? A. Yes, sir.

Q. And the name under which you were going to do business? A. Yes, sir.

Q. Following the receipt of that \$9,600 check from Mr. Peake, what did you do with that check? Where did you deposit it, and to whose credit?

A. On June 1st I indorsed it C. L. Boss Automobile Company, then C. L. Boss, deposited on this slip—the vice-president of the bank states here it is the original slip—together with \$8,000 of money that I borrowed on my property, together with \$8,500—

COURT.—Never mind going into that. He simply asked what you did with that check.

(Testimony of C. L. Boss.)

A. Deposited that day in the bank.

Q. In whose name?

A. Name of Charles L. Boss.

Q. Yes. Is this the deposit slip?      A. Yes, sir.

Q. Referring to this item—      A. Yes, sir.

Q. You spoke of an \$8,000 item on this deposit slip. Have you any check showing where that came from?

A. From money borrowed of the Western Bond & Mortgage Company [141—66] personally.

Q. By yourself?      A. Yes.

Q. Where did the \$8,537.15 on this deposit slip come from?

A. Out of the treasury of the Boss & Peake Automobile Company.

Mr. SMITH.—We now offer these three documents in evidence as one.

Mr. REILLY.—If they are going to offer these three documents in evidence as one, we would like to have the check from Boss & Peake Automobile Company to Charles L. Boss for that balance.

A. It was not to Charles L. Boss.

Mr. REILLY.—Well, whatever it was, let's have that check. They are offering this as one transaction, leaving out the most important part of it, the only part that counts.

Q. Have you a check from Boss & Peake Automobile Company to yourself of \$8,537.15?

A. I presume I can find it.

Mr. SMITH.—We will have to search for it, then, and produce it. They want to see it. We will attach it to this as part of the same exhibit.

(Testimony of C. L. Boss.)

Mr. REILLY.—We have no objection, with that statement.

COURT.—Very well. Let it be so marked.

(Marked Boss' Exhibit "C.")

Q. In your testimony you referred to some notes, sale notes, which also refer to warehouse receipts, etc., in which these automobiles were located. Are these two documents which I now hand you duplicates or originals of documents in that transaction?

A. This is an original, showing the warehouse—  
[142—67]

Q. This one in blue?

A. Yes; showing the warehouse it was in, and the warehouse receipt was attached to that. That was one of them. This was one of the automobiles that was up at the store on which there was no warehouse receipt attached to it, and that is why it was brought down.

Q. This was this yellow document? A. Yes.

Q. Those two are original documents? A. Yes.

Mr. SMITH.—We will offer them in evidence.

Mr. REILLY.—Objected to unless they produce them all. They are offering them as part of a transaction here, and they say there were eight notes, and they come in with two.

Mr. SMITH.—All right.

Q. Do you know where the others of these notes are?

A. No. One of them was put on the document that was turned over to the Government, and went on to Washington; and the others are old canceled



(Testimony of C. L. Boss.)

notes, and I could not find them in the record. I hunted for them. The records are on the books here.

Q. You stated you turned over to the Government this large mass of papers and documents?

A. Supplementary statements, final closing statements and memoranda.

Q. And none of them have ever been returned to you? A. No, sir.

Q. Have you searched for the remainder of these notes? A. Yes, sir.

Q. Where have you searched?

A. We changed bookkeepers twice. The bookkeeper—I kept [143—68] him busy for days trying to find all this old stuff.

Q. When did you make search for them, Mr. Boss, about when? A. Oh, it must be a year ago.

Q. Was it in connection with preparing this case that you made the search? A. Yes, sir.

Q. Have you been unable to find them?

A. We have not been able to find them anywhere. The three were all we were able to find—the one that went to the Government and these two here. The record is complete of them.

Mr. LOGAN.—I will state to your Honor, one of these notes is included in the photostatic copy introduced by the Government here.

Mr. MAGUIRE.—What is the number, Mr. Logan, in that photostatic reproduction?

Mr. LOGAN.—J-363.

Mr. MAGUIRE.—That is the only number given?



(Testimony of C. L. Boss.)

Mr. LOGAN.—Yes. \$1200.

Mr. MAGUIRE.—These two are also \$1200.

Mr. SMITH.—That is what he said that each of the eight notes was for, \$1200.

Mr. MAGUIRE.—That is what I say.

A. The record here gives the numbers of each car.

Mr. LOGAN.—It is admitted this is not the same note as either of the other two. This is a third one.

Mr. MAGUIRE.—That is a copy of one of the other notes.

COURT.—Do you object to those?

Mr. REILLY.—No, it is all right, your Honor.  
[144—69]

Mr. MAGUIRE.—They are accounted for.

Mr. SMITH.—We offer these two in evidence, if your Honor please.

(Marked Boss' Exhibit "D.")

Q. Referring now to your combined cash and journal, Mr. Boss. Are there any entries in that book which refer to or record the eight automobiles to which you have referred in the transaction with Mr. Peake? A. Yes, sir.

Q. Where is that record—on what page, please?

A. On page 120.

Mr. SMITH.—We will offer the record in evidence, for the purpose of completing his testimony on that subject, and showing the eight automobiles that were taken by Mr. Peake.

COURT.—What is the effect of the record?

Mr. SMITH.—Just read. I will have him read,

(Testimony of C. L. Boss.)

if the court please, the eight entries. They are very short.

A. Charged into Bills Payable, J-636—

Q. Meaning Journal?

A. Journal; combined journal and cash book.

Q. Read what the entries are, please.

A. \$1200, and there is one without a number, \$1200; then J-378, \$1200.

COURT.—You need not go further.

Q. Now, can you take this combined cash and journal and refer to that J-636, and show us what automobile it was that he got? Show us the number of the automobile or the record?

A. That is the number; that is the factory number. [145—70]

Mr. SMITH.—As far as we are concerned, we are offering all the books and records in our possession, and are referring to them. We are referring particularly now to page 120 of combined cash and journal, month of June, 1917, at which these entries occur.

Q. After this transaction with Mr. Peake and after June 1, 1917, who conducted the automobile business theretofore run by the Boss & Peake Automobile Corporation?

A. C. L. Boss Automobile Company.

Q. Has the Boss & Peake Automobile corporation been in business since June 1, 1917?

A. No, sir; not since May 31, 1917.

Q. Now, in relation to this income tax in question, Mr. Boss: Were you present with or were you

(Testimony of C. L. Boss.)

around about your business while the Government agents were investigating to see what tax you would have to pay?

A. Why, I just turned the room over to them, and the books over to them, and I never saw them unless they asked some questions.

Q. They worked that out at your place of business, did they? A. In a private room.

Q. What records did they have access to in getting at it?

A. All the records of our institution; and the bookkeeper was instructed if they wanted anything to be at their beck and call.

Q. Do you remember at what amount the excess profits tax was fixed for the period in controversy? How much excess? A. \$12,405.30.

Q. Did you pay any part of that? [146—71]

A. Just as soon as I was advised as to what it was, I went down there and paid, as I understood I was a stockholder, as I understood I was responsible as a stockholder for my proportion of the stock I held at the time the business was a going concern.

Q. What is this document I now hand you?

A. This is the check showing my payment.

Q. To whom was it made? A. To Milton A. Miller.

COURT.—What is the date of that check?

A. August 19, 1920.

Q. And the amount of it, please? A. \$6202.65.

Mr. SMITH.—We offer the check in evidence.

(Testimony of C. L. Boss.)

(Marked Boss' Exhibit "E.")

Q. Now, after this transaction, Mr. Boss, the transaction with Mr. Peake, and after the C. L. Boss Automobile Company took up the business on June 1st, about how long was it until the Boss & Peake Automobile Company actually dissolved? What did you do to dissolve the corporation, and when?

A. We went down to Mr. Logan's office, and left the technical matter entirely in his hands. And before we left there, he said, "Sign this statement," which was our statement of copartnership, before we left the office. Then he was very busy, and he said to us that he would prepare the papers—there was no particular hurry about it, but in plenty of time he would look after the detail work, the technical work that is required by the State statutory law.

Mr. SMITH.—Is there any question about the date of the actual dissolution, gentlemen?

Mr. REILLY.—The minute-books show the proceedings. [147—72] They are the best evidence of what happened.

Q. You don't in any way question the amount of this tax due the Government, do you, Mr. Boss?

A. No, sir.

Cross-examination.

(Questions by Mr. REILLY.)

Mr. Boss, at the time the Boss & Peake Automobile Company was organized and bought the assets of the C. L. Boss Company, the partnership

(Testimony of C. L. Boss.)

that was in existence at that time, that partnership was insolvent, or practically so, was it not?

Mr. SMITH.—Objected to as wholly immaterial, incompetent, and irrelevant in this case. This is the old partnership that went out of business in November, 1916, and its financial condition is not before this court.

Mr. REILLY.—It is very important.

COURT.—Well, the corporation took over the business of that concern?

Mr. SMITH.—Not all, if the Court please, under the testimony of the witness.

COURT.—The testimony may be relevant to determine what property came into the hands of the Boss & Peake Automobile Company.

Mr. REILLY.—It is very relevant, your Honor, upon this testimony of the witness that when they entered into their corporation, when they organized the corporation, that they had some sort of an agreement that when they dissolved that they would do otherwise than dissolve on each person taking half of the assets. In other words, a [148—73] fictitious value has been placed by the witness upon the goodwill of the business of the C. L. Boss Company, and he is using that as a means of explaining why Mr. Peake didn't get even one-half of his so-called half of the real assets.

COURT.—You may proceed to inquire.

Q. (Question read.)

A. It was practically so.



(Testimony of C. L. Boss.)

Q. And it was at your solicitation that the corporation was formed by yourself and Mr. Peake?

A. While it was at my solicitation, the first solicitation came from Mr. Peake in offering us money for brokerage purposes; and not only did he do that, but he many times came into the books of the C. L. Boss Company, and saw what the profit was on the Hudson Super Six automobile, time and time again.

Q. Just a moment, Mr. Boss. Try to confine yourself to my questions, if you can.

Mr. LOGAN.—He is explaining whose solicitation it was.

Mr. REILLY.—He is making his usual argument.

COURT.—He made the answer to that before. It is taking up a good deal of time with very many details.

Q. Then do I understand you to testify that when the corporation was formed, when you subscribed for your stock, started your corporation, that you at the beginning of things began to plan what you would do at dissolution? Is that what you testify to?

Mr. SMITH.—Object to the form of the question. He may state the fact.

(Objection overruled.)

COURT.—Go ahead and answer the question.  
[149—74]

A. In entering into the preliminary negotiation the matter was taken up under what condition we would conduct business between ourselves.

Q. That does not answer the question, Mr. Boss.



(Testimony of C. L. Boss.)

Do I understand you to say that in organizing this corporation you made your plans concerning dissolution of it? Is that a fact or not?

A. No; it could not be a fact. We made plans between ourselves.

Q. Did you make plans when you were forming the corporation as to what you were to do when the corporation was dissolved, if ever?

A. If we decided that we wanted to dissolve, it was decided that we would at no time take on obligations that we could not dissolve and cease to do business whenever we so elected; that is, we would not contract in such a way that would keep us continuously obliged.

Q. In other words, then, as I understand this agreement, it was that you would not get yourselves so far in debt that you could not liquidate?

A. The debt was not taken into consideration at all. It was running obligations that would tie us together an indefinite length of time.

Q. And that is all. There was not any other understanding between you as to what you would do when dissolution time came around? There was no other understanding between you at the time you formed this corporation as to anything concerning dissolution? A. Yes, there was.

Q. What was it?

A. That when we could not get along we would dissolve and cease to do business with each other. It was a very cautious preliminary proposition on account of Mr. Peake wanting to [150—75] hold

(Testimony of C. L. Boss.)

himself in such a position that he would not be held for debts or liabilities beyond a season, and at the time that we had our negotiations he never wanted any obligations that would carry over from one season to another.

Q. That does not quite answer the question. Was there any other arrangement or any other understanding or any other agreement as to what should become of any part of the assets of the corporation at dissolution? Was any such preliminary agreement made when you formed the corporation? A. No, sir.

Q. None whatever? A. No, sir.

Q. Now, after the corporation was formed, it started from the jump to make money, didn't it?

A. It made \$472 from November to January.

Q. Where did you get those figures?

A. The report that Mr. Peake filed with the Treasury Department.

Q. Wasn't it \$604?

A. With Mr. Weldy. Well, possibly I am mistaken. But if I remember it was \$472. I will admit that I might be corrected in that.

Q. From that time on the business was making lots of money?

A. The business made money from the time the Super Six contract came in, the automobile business did.

Q. When did the Super Six contract come in?

A. In the hands of the C. L. Boss Automobile Company.

(Testimony of C. L. Boss.)

Q. I am not talking about what happened after the corporation ceased doing business. The corporation made money all of its existence, didn't it?

A. Yes, sir.

Q. And made good money?

A. Yes, sir. [151—76]

Q. And was a live, going concern?

A. Yes, sir.

Q. And had an agency which was in all probability good for many years?

A. No. Agencies are subject to recontract every year.

Q. Yes; but nevertheless these agencies continue as a rule in the same hands, if the business is properly handled, don't they?

A. No. Covey lost the Dodge, and he couldn't help it.

Q. How long have you been handling the Hudson Super Six, the Hudson agency?

A. Ever since 1913; staging it first as a copartnership, then as a corporation, and like a play in another opera-house, under copartnership again, after the dissolution of the Boss & Peake Automobile Company.

Q. What about the play in the opera-house?

A. Just the same, in the same place.

Q. So that all this amounts to, then, is that you have been doing business here all this time in the same stand carrying on the same business, except that for a time Mr. Peake had an interest in the corporation? Is that what you mean?

(Testimony of C. L. Boss.)

A. No, sir.

Q. That is what you mean?

A. No, sir. We had Reo trucks one time, the Maxwell automobile one time, Maxwell and Chalmers at one time, along with the Hudson cars. It wasn't the same business, by any means.

Q. Now, state if the reason or one of the reasons that the corporation started making money wasn't that Mr. Peake arranged the financing of the company in such a way that it was not necessary for you to discount the paper you received from your purchasers.

A. That was immaterial compared with the benefit derived from [152—77] the predominant place that the Hudson automobile had. And on the Hudson we made money before the corporation was formed just as much as we did afterward.

Q. That didn't make any difference in your profits, the fact that Mr. Peake was able to get your paper negotiated without discounting it?

A. Practically little or no difference before or afterwards.

Q. Now, Mr. Boss, a moment ago—I was just looking for this—a moment ago you stated that at the time the corporation was organized there was no agreement concerning the manner of dissolution or the division of the assets of the corporation when it was dissolved.

A. How is that now? Please say that again.

Q. I say, a moment ago you testified that at the time the corporation was organized there was no

(Testimony of C. L. Boss.)

agreement of any kind relating to the division of the assets of the corporation, if and when it was dissolved? A. Oh, yes, there was.

Q. Didn't you so testify just a moment ago?

A. Any time that we wanted to cease to do business that we would be under no obligation that would bind us for the future.

Q. And there was no other agreement of any kind?

A. There was an agreement that I was to have a salary.

Q. Yes, and that he was to have.

A. And that was never entered up.

Q. What?

A. And that was never authorized in our minutes.

Q. All right. I don't care anything about that. There was no other agreement concerning the division of the assets? [153—78]

A. You mean a separate division of the assets? It was not specified how we would divide the assets at all.

Q. Was there any agreement concerning any division of the assets of the corporation made when the corporation was organized?

A. We had a verbal agreement between Mr. Peake and myself, under certain conditions and certain things. Nothing in our minutes here at all.

Q. I don't care anything about your minutes.

A. Ask me right out what you want, so I can get your question.

(Testimony of C. L. Boss.)

Q. I am giving you the question squarely; did you make any arrangement or agreement with Mr. Peake concerning the division of the assets of the corporation? Did you at the time that you organized the corporation make any agreement as to how any of the assets of the corporation were to be divided when the corporation was dissolved?

A. Yes, how they were going to be divided, but not as to the division of any assets.

Q. Well, what do you mean by how they were to be divided?

A. It was this: when he purchased the live assets of the C. L. Boss Company, he would pay no premium; that it would be at the cost. If at the time we dissolved and distributed our assets, if they fell to me I was to pay no premium for the assets, the like assets of what organization or what corporation we had at the time.

COURT.—What do you mean by premium?

A. Well, now, then, the goodwill of the C. L. Boss Company was not taken into consideration.

COURT.—Is that alleged goodwill there?

A. Yes.

COURT.—Very well. Go ahead. [154—79]

A. And the merchandise would be put in at what it cost.

Q. Well, now, what was the goodwill of the C. L. Boss Company, a bankrupt partnership, worth?

A. That was not bankrupt. It was insolvent.



(Testimony of C. L. Boss.)

It had nothing of any particular value, but it was not bankrupt. It had always met its obligations up to that time, and has since.

Q. Well, the insolvent partnership, what was its goodwill worth?

A. It was worth the contract with the Hudson, which was the very thing and the only thing of any particular value outside of the merchandise and assets.

Q. Well, how much was the Hudson contract worth? A. What was it worth?

Q. How much was the Hudson contract worth?

A. Nothing unless a man would equal the factory requirements; a good deal if the man was of ability to equal the factory requirements.

Q. How much was it worth to the C. L. Boss & Company partnership?

A. No more than it was worth to the Boss & Peake Automobile Company.

Q. I don't care anything about that. How much was it worth to C. L. Boss & Company?

A. Well, that is a question, I cannot say right offhand.

Q. How much was it worth to the corporation, then?

A. I would state that that is something a man cannot state, what it is worth. It is simply a right of franchise to do business during a limited period; and if you are not equal to the occasion during that period, you cannot have it for the [155—80] next season's business.

(Testimony of C. L. Boss.)

Q. Is it worth anything?

A. For a man who is equal to the occasion it is worth considerable. For a man that is not equal to the occasion, it is not worth anything.

Q. How much is it worth to a man who is equal to the occasion?

A. It depends altogether on a man's ability. It is like selling a man's liability in business right over again.

Q. You know something about your own ability, do you?

A. Yes. I made some money when I was in real estate.

Q. You know something about Mr. Peake's ability? A. Yes.

Q. You know what salesmen you had?

A. Same men that we had in the company beforehand.

Q. All right. Then how much was it worth to a man of your ability, with the salesmen you had when the partnership owned it, the partnership of C. L. Boss & Company?

A. That is a hard question to determine.

Q. Well, nevertheless, determine it.

A. I would not give a cent for it to bargain it, because the factory would not allow it to be bargained; could not bargain it at all. It is only the factory that reserve that right to themselves. That is where they have the right to dicker.

Q. That is not the question I asked you, Mr. Boss. How much was it worth?

(Testimony of C. L. Boss.)

A. It hasn't got one cent's commercial value.

Q. It hasn't got one cent's commercial value?

A. No, sir; because you cannot commercialize it. You cannot [156—81] even transfer it.

Q. The agency is of no value to the business?

A. I couldn't say that.

Q. Well, what was the value to the business? That is what I am trying to get at.

A. No commercial value.

Q. What kind of value? Did it have any value of any kind, commercial or otherwise, to the partnership of C. L. Boss & Company?

A. Not that the company or the partnership had in itself as an entirety. That belongs to the factory.

Q. Well, then, as I understand you, the agency for the Hudson Super Six—the Hudson cars generally? A. Yes.

Q. That the partnership of C. L. Boss & Company had was worth nothing to the partnership?

A. No, I didn't say that. I said it was a valuable agency in case the party having it was equal to the occasion. It had no commercial value.

COURT.—That is, was able to handle it.

A. Yes.

Q. All right. Was the partnership able to handle it? A. Yes, sir.

Q. All right. Then what was it worth to the partnership? You say it was a valuable asset to it. Now, how much was it worth?

(Testimony of C. L. Boss.)

A. It has an undetermined value, according to the ability of the man.

Q. Worth \$25,000? [157—82]

A. No, it was not worth any commercial value at all. It is just like selling a man's ability back to him. What is your ability as an attorney? Can you sell your ability as an attorney? Can you transfer your ability to somebody else? You cannot transfer the essence of value in a contract to anybody else.

COURT.—Let me inquire what the point of this is.

Mr. REILLY.—The point of it is this: this agency was an asset of such a value that, if there was any dissolution of the corporation, it must have been taken into account, and Mr. Peake, in the dissolution, would have got at least \$25,000 in excess of the sum he got if this was a dissolution. That is the purpose of it, your Honor, and that is one reason why I am having so much trouble with the witness.

Mr. LOGAN.—The same argument would apply to a sale of stock.

A. The new Dodge concern didn't pay one cent.

Q. We don't care about the Dodge.

A. Nobody pays anything for that.

Q. Will you, or will you not, place a value upon the Hudson agency and the other agencies which the partnership of C. L. Boss & Company had at the time it sold out to the Boss & Peake Automobile Company.

(Testimony of C. L. Boss.)

Mr. LOGAN.—We submit, your Honor, that he has answered that by saying certain things.

COURT.—It is not clear to the Court yet that he has answered it.

Mr. REILLY.—I can't find an answer.

COURT.—Go ahead.

A. The value is in the value of the man, the ability of the [158—83] man to conduct a successful business.

COURT.—Well, who is the man that conducts it? Wasn't it yourself? A. Yes, sir.

COURT.—Your ability was transferred from C. L. Boss & Company to the Boss & Peake Automobile Company, wasn't it? Isn't that the point?

A. Yes, sir.

COURT.—Well, now, then, answer the attorney's question what that was worth.

A. What my ability was worth?

COURT.—No. What the agency was worth.

A. Mr. Peake stated at the time he didn't think it was worth anything.

Q. Never mind what Mr. Peake stated.

COURT.—You answer the question if you can.

A. I cannot answer it, Judge. I cannot answer it. I don't see any ground for answering it.

COURT.—Did it have any value at all?

A. Not in itself.

COURT.—Well, you have been over that; but under the conditions that then existed, did it have any value?

(Testimony of C. L. Boss.)

A. No, if I had to go out of business, I took the same ability I had in real estate.

COURT.—You were carrying yourself over into the Boss & Peake Automobile Company? Your ability was to go along with that?

A. I was to get a salary for that.

COURT.—Now, what was this agency worth under those conditions?

A. Offset by the hazard that was going into the automobile [159—84] business.

COURT.—That does not answer the question. Go ahead with your examination.

Q. You can make no better answer, or will make no better answer to the value of the agency to the partnership than you have so far made?

A. I cannot set a commercial value on something that had no commercial value.

Q. That is good enough. What was the value of the agency to the corporation at the time Mr. Peake sold you his stock?

Mr. SMITH.—Objected to as assuming a state of facts not yet proven.

Q. Well, on the 31st day of May, 1917?

A. Value to the corporation? The corporation had ceased to exist, and they could not transfer it.

COURT.—He is talking about the agency of this car. What was the value to the corporation that got it?

A. Why, they could not transfer it. It was not commercial. In fact, we had to be approved personally.



(Testimony of C. L. Boss.)

Q. How long did that contract have to run after May 31st, 1917?

A. November 1st—let me see—at that time December 1st. Wait a minute. I wouldn't say. I am not positive.

Q. Wasn't it January 1st of the following year?

A. No. They never date their fiscal year at January. It was either September 1st, or October 1st, or November 1st.

Q. And it had been the practice and is generally the practice for automobile companies to make their contracts for one year at a time? [160—85]

A. Yes, sir.

Q. Renewing them if they are satisfied with the people they are doing business with?

A. Yes, sir.

Q. At the end of each year? A. Yes, sir.

Q. And this agency had at least May, June, July and August to run? A. No, May 31st.

Q. June, July and August to run, at least?

A. Yes.

Q. Assuming that it terminated September 1st, the earliest date you have given us? A. Yes.

Q. And that was, in your judgment, of no value to the corporation? A. No commercial value.

Q. Now, what other agencies did the corporation have? A. Maxwell Motor Sales Corporation.

Q. What? A. The Maxwell agency.

Q. How long did the Maxwell agency have to run? A. One month.

Q. Terminating July 1st? A. Yes.

(Testimony of C. L. Boss.)

Q. And the custom of the Maxwell people was to make their contracts from year to year, renewing if they were satisfied with the agents?

A. Yes, sir.

Q. How much, if any, was the value of this Maxwell agency on May 31, 1917?

A. No commercial value, because they were writing the new contracts right at that time. They always write them 30 days [161—86] in advance, and then if the agency was not satisfactory, there was nothing there.

Q. Had they written a new contract for the corporation at the time of this sale of the stock?

A. No, no, sir.

Q. How soon after the 31st of May was it that a new contract was made with the Maxwell people?

A. Early in June.

Q. Do you know how early?

A. No, sir. It is customary, however, for us to sign the contract 30 days in advance of expiration.

Q. Well, that would be the 31st of May.

A. It would be either that or around the first of June.

Q. So that, at the time of this transaction, you were almost in the act of signing up a new Maxwell agency?

A. Yes, that was it. I doubt if any goods—

Q. You place no value upon that agency?

A. No commercial value.

Q. How long did your lease of the property or premises up there have to run?

(Testimony of C. L. Boss.)

A. The lease was in my name. It never was in the Boss & Peake Automobile Company's name at any time.

Q. How long did the lease have to run?

A. I had a lease on the building for three years.

Q. For three years following May 31st, 1917?

A. No, it had about two years and several months to run.

Q. Two years and several months to run?

A. Yes.

Q. Did you take the lease of the building in your own name during the existence of the corporation? [162—87]

A. No. Mr. Peake forced me to take it in my name, and had a clause put in it that it could be assigned over to the corporation; and he would never allow me to sign it over—never assumed the liability under the lease, that remained in my name during the time of business.

Q. Did the corporation pay the rent?

A. The corporation paid the rent; yes, sir.

Q. And that had two years and some months to run? A. Yes.

Q. Do you place any value on that to the corporation?

A. No. We paid as much rent for it then within seventy-eight dollars as we do to-day.

Q. When was it that this first conversation took place concerning Mr. Peake getting out of the corporation, without specifying the form that transaction took? When was it first discussed?

(Testimony of C. L. Boss.)

A. After Mr. Peake took Mr. McRell to dinner in March and Mr. McRell reported to me that Mr. Peake had made overtures.

Q. I am not talking about that. I am talking about conversations between you and Mr. Peake concerning Mr. Peake selling out to you.

A. Either in February or March.

Q. Between you and Mr. Peake.

A. When we first talked about quitting our business relations.

Q. When was the first discussion between you and Mr. Peake concerning Mr. Peake selling out to you, by which you got down and discussed concrete propositions, or considered the question of his selling out?

A. On May 21st, 1917, at the depot, he made his first proposition for dissolution. In March of 1917, after a conversation, [163—88] he made an offer to sell out.

Q. What do you mean by an offer to sell out?

A. He made an offer to sell his stock in March of 1917, and that offer at the time I accepted, and went down into Mr. Logan's office and stated to Mr. Logan to draw up the paper, and Mr. Logan drew up the paper, and I went up there and gave it to Mr. Peake, and then he didn't want to do it. That is the only time he offered to sell his stock. The other time was to cease to do business, closing up our relations together.

Q. This conversation, you say, in March, was one by which he offered to sell you his stock.

(Testimony of C. L. Boss.)

A. In March of 1917 he offered one day to sell his stock out to me, and the very offer at that time I made a memorandum of, and took it down into Mr. Logan's office and had him draw it up in writing, and brought the writing right back up to Mr. Peake, and gave it to him that very day, and then he would not come through on the deal.

Q. He refused to sign?

A. He refused to come through on the deal on the very offer that he made.

Q. Is this the agreement in March, the one that you tendered to Mr. Peake?

A. Yes, sir. That is the very deal.

Mr. REILLY.—We will offer it in evidence.

(Marked Peake's Exhibit "A.")

COURT.—What provision of that is important?

Mr. SMITH.—It is unsigned, isn't it, Mr. Reilly?

Mr. REILLY.—It is; but it is stated by the witness to have been drawn by his attorney and offered to Peake, and Peake refused to sign it. It becomes important because of [164—89] certain allegations in the complaint. I would rather not disclose the purpose now.

COURT.—Very well.

Mr. REILLY.—Do you waive the reading of it now?

Mr. SMITH.—No, sir.

Mr. REILLY.—Very well. (Reading:) "This agreement made and entered into this 26th day of March, 1917, by and between E. W. A. Peake, hereinafter called the vendor, of the one part"—



COURT.—What is the object of reading it now?

Mr. Smith to get the terms before the court firmly at this time that are in that document, March previous, because the witness has drawn a distinction between that and what was done finally.

COURT.—Well, read it then.

(Document read as follows:)

“THIS AGREEMENT made and entered into this 26th day of March 1917 by and between E. W. A. PEAKE hereinafter called the ‘vendor’ of the one part and C. L. BOSS hereinafter called the ‘purchaser’ of the other part.

WHEREAS, there was organized and incorporated on the — day of —, 1916, a domestic corporation with its principal office and place of business at Portland, Multnomah County, Oregon, officially known and designated as Boss & Peake Automobile Company with an automobile stock of \$30,000.00 divided into three hundred (300) shares of the par value of one hundred (\$100.00) dollars per share, and

WHEREAS, of the said three hundred shares of stock of said corporation there is now owned by said vendor 149 shares thereof in his own name and he is the assignee of one share of stock of said corporation heretofore issued to R. E. Murphy, making in all now owned and controlled by the said vendor 150 [165—90] shares of capital stock of said corporation, and

WHEREAS, the said vendor and the said purchaser have this day agreed upon an option for



sale herein given and made by the said vendor to the said purchaser upon the considerations and promises hereinafter expressed,

NOW, THEREFORE, this agreement for sale and option, WITNESSETH: That the said vendor E. W. A. Peake agrees upon July 1, 1917 next following to sell and deliver to the said purchaser C. L. Boss, at the office of Boss & Peake Automobile Company at Portland, Oregon, 150 shares of the capital stock of Boss & Peake Automobile Company for the consideration of One (\$1.00) Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and upon the following terms, to wit:

That on July 1, 1917 there shall be taken and completed an inventory of the goods, wares and merchandise and open accounts then owned by Boss & Peake Automobile Company based upon cost of original purchase by the said corporation from C. L. Boss & Company and the purchase price of goods, wares and merchandise bought by said corporation since its incorporation, 50% of which inventory shall constitute the sale value of the said 150 shares of the corporate stock of the said Boss & Peake Automobile Company upon which this option is given; that the said purchaser shall pay or cause to be paid to the said vendor within three days after the completion of said inventory so found as above set out a sum of money in cash equal to 50% of such inventory.

It is further agreed that the said purchase shall be completed on or before the third day next suc-

(Testimony of C. L. Boss.)

ceeding the completion of the inventory which shall be commenced and finished as of the 1st day of July 1917 and said inventory shall be taken and completed with expedition and on payment of the said sum of money as hereinbefore set out, the said 150 shares of the capital stock of said corporation shall be at the same time duly transferred by the said vendor to the said purchaser.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.

Witnesses:” [166—91]

Q. Mr. Peake refused to sell on those terms, did he not?

A. He refused to comply with his proposition to sell.

Q. He refused to sign this agreement?

A. Yes, sir.

Q. Now, before I forget to ask you, as I understand, you testify that in this sale by Mr. Peake to yourself, or whatever this transaction amounted to at the end of May, the reason you didn't get an even break in the end was that you assumed the liabilities of the corporation. Is that so?

A. No, I didn't say that. I said that he estimated that the net profit would be \$20,000, allowing over \$2000 to cover the guarantee on the notes, our endorsement, the service on the cars that were already out, the incidental bills that we could not keep on this momentary statement—we would go out and buy something; the bill hadn't

(Testimony of C. L. Boss.)

come in—we cannot keep it. His own statement was that while this supplementary statement showed over \$22,000 net profit, he estimated the net profit was \$20,000; and he said, “I must have my”—

Q. Just a moment. Those liabilities he was to be relieved from? A. Yes, sir.

Q. So that when he disposed of his stock to you, whatever you call the transaction, without wanting to commit yourself that it is a sale or what it is— A. Yes.

Q. When he indorsed his stock and handed it to you, he was to be clear of the corporation's debts? Is that right?

A. That was the part that I was to take, yes, the liabilities and the—

COURT.—You assumed the liabilities of the concern? Is that the fact? [167—92]

A. No, no. I assumed the liabilities on the notes of the concern. I assumed the overhead expense. I assumed the service on the cars. That is, that amount was set aside for, eliminated from the rest of the profit to take care of it. Now, then, that part I was to assume, and I was to assume the open accounts.

Q. Was there any agreement at that time, when the stock was transferred to you, that Mr. Peake was to assume or respond to any of the corporation's liabilities?

A. No, he was not to assume—respond to anything.

(Testimony of C. L. Boss.)

Q. And the agreement was, was it not, that in that transfer you were to take whatever liabilities there were?

A. Yes, that is right. I was to take the liabilities.

Mr. REILLY.—That is all.

Recess until 2 P. M.

Portland, Oregon, May 23, 1922, 2 P. M.

C. L. BOSS resumes the stand.

Cross-examination Continued.

Q. Have you brought into court the sheets—I see you have—showing the capital account of R. J. McRell and C. L. Boss? A. Yes.

Q. Have you the bill of sale from the Boss & Peake Automobile Company to the partnership?

A. Mr. Logan kept our technical papers.

Mr. LOGAN.—I have it.

Mr. REILLY.—Will you allow us to inspect it?

Q. You have testified that the corporation turned over eight automobiles to Mr. Peake and that Mr. Peake transferred them back to the C. L. Boss Automobile Company. Have you a copy—have you any bill of sale from the corporation to Mr. E. W. A. [168—93] Peake of those eight automobiles, or of anything else? A. No, sir.

Q. Have you produced the original stock certificates of the Boss & Peake Automobile Company with the stubs?

A. We haven't any stubs to my knowledge. All our papers were kept by Mr. Logan, and I don't

(Testimony of C. L. Bos\$.)

know of any stubs. If there were, I don't know of them now, and I don't know that there were.

Q. Did Mr. Logan keep the stock books of your corporation in his office? A. No, sir.

Q. They were kept in your place of business?

A. Well, I don't think so. I think at that time Mr. Peake kept them.

Q. After he turned the stock over to you?

A. Everything was taken down on June 1, 1917, and all turned over to Mr. Logan—left with him.

Q. Then you say that Mr. Logan has your stock books?

A. I don't know that there was a stock book. I don't remember ever seeing a stock book. The original stock is there.

Q. Has Mr. Logan the stubs which were originally affixed to those stock certificates?

A. I don't know that there were any stubs affixed to them.

Q. Have you your minute-books?

Mr. LOGAN.—I have them.

Q. Let me refresh your memory from your minute books as to whether there was a stub.

A. Yes, there is a stub attached to that.

Q. Well, isn't that stated to be the form of your stock?

A. Well, you might buy those sheets anywhere in the stationery [169—94] house.

Q. Now, then, were there, or were there not, stubs attached to your original stock certificates?



(Testimony of C. L. Boss.)

A. Not to my knowledge.

Q. Do you mean to say you don't know that there were stubs, similar to that shown in the book, attached to the stock certificate marked Exhibit "A" in your minutes?

A. No, I don't know that there was any stub there. I just thought that that was stationery stock that was purchased just for this occasion.

Q. Have you ever seen any of those stubs?

A. Why, I don't recall of ever seeing any. I don't recall anything about them.

Q. Did you ever hold any office in any other corporation than the Boss & Peake Automobile Company? A. No, sir.

Q. Are there among your papers these stubs of these stock certificates?

A. Not to my knowledge.

Q. Or anywhere in your books?

A. No, sir, not to my knowledge.

Q. Mr. Logan was your attorney in June, 1917?

A. Yes, sir. He has been my attorney for pretty near 17 years.

Q. He has been your attorney ever since June, 1917? A. Yes, sir.

Q. He was your attorney in the spring of 1920; he was your attorney at all times since this transaction in May, 1917?

A. Yes. But we have had other attorneys under some other conditions. But he has been our regular retained attorney. He [170—95] was my



(Testimony of C. L. Boss.)

attorney when the company was the C. L. Boss & Company, prior to the corporation.

Q. He was your attorney who was handling for you these income tax matters or these excess profits tax matters with the Federal Government?

A. No, I went down to the Federal office and got the information there. I didn't ask for any attorney to draw up the papers.

Q. You did consult with Mr. Logan during some part of this? A. Oh, in this business, yes.

Q. Concerning the tax which has been claimed by the Government? A. Yes.

Q. And he was your attorney in that matter and had some discussions on your behalf and aided you in writing letters and wrote some himself? Isn't that true?

A. Now, I don't know that he aided me in writing. He wrote some himself.

Q. And those were at your instance?

A. Oh, yes.

Q. And he was authorized to write them by you?

A. Yes, sir.

Q. And you informed him of the facts concerning the corporation and the partnership to enable him to write letters on the subject? A. Yes, sir.

Mr. SMITH.—Let the record show that we produced that, Mr. Reilly.

Mr. REILLY.—It is here. If you want the record to show you produced it in response to demand, very well.

Q. Is this the bill of sale from the Boss & Peake

(Testimony of C. L. Boss.)

Automobile Company to the C. L. Boss Automobile Company? [171—96]     A. Yes, sir.

Q. Is that your signature over the word president?     A. Yes, sir.

Q. Is that McRell's signature over the word secretary?     A. Yes.

Mr. REILLY.—We will offer this bill of sale in evidence.

COURT.—Is there any objection to that?

Mr. SMITH.—No objection, if your Honor please.

COURT.—Let it be marked.

(Marked Peake's Exhibit "B.")

Q. Now, you have stated, Mr. Boss, as I understand it, that you were not able to produce any of those what you have called in your answer and cross-complaint the satisfactorily estimated statements of the business.

A. Why, I turned them all over to Mr. Weldy and Mr. Butterfield.,

Q. Now, did you turn over among those statements one which was made on or about the 31st day of May, 1917?

A. No, it was made about—it was made in the neighborhood of the 20th of May, or before that time.

Q. Did you turn that one over which was made on or about the 20th day of May, 1917? Did you turn that over to Mr. Weldy?

A. All those memorandums and final statements and everything, I had in a bunch and kept them all

(Testimony of C. L. Boss.)

together, and turned them all over to Mr. Butterfield and Mr. Weldy.

Q. Was that one of May 20th among the number that you turned over to Mr. Weldy?

A. I cannot say, but I had those satisfactory supplementary statements that were turned over, together with all final statements, and lots of memorandums I had, that I kept and kept [172—97] together.

Q. Did you turn over all of the satisfactorily estimated statements that were ever made down there in your business to Mr. Weldy?

A. Oh, no, no, no. Those were destroyed, a good many, as the time went by, and new ones came up.

Q. Did you turn over all the latest ones made during the life of the corporation to Mr. Weldy?

A. No, I had quite a number of supplementary statements and quite a number of memorandums, together with my final statements, that I turned over to Mr. Weldy.

Q. Well, did that include all of the latest so-called satisfactorily estimated statements?

A. I cannot tell you at this time. It is absolutely impossible for me to know what I turned over in the final detail of each one. But I had kept as my record all the memorandums and data and everything; had a big bunch of them.

Q. You had kept all of these satisfactorily estimated statements then, had you?

A. No, sir, I didn't keep all of them.

(Testimony of C. L. Boss.)

Q. Well, I mean, you didn't turn any of them over to Mr. Peake?

A. He had his when I had mine. He had copies.

Q. There were two of them? A. How?

Q. They were made out in pairs?

A. When Mr. Murphy would draw us off statements, almost invariably—not at all times—he would draw up one for Mr. Peake and one for myself.

Q. Then these statements, this statement on or about the 20th day of May you would say was in duplicate?

A. No, I didn't. It might have been. I didn't say it was in [173—98] duplicate. He might have made one statement. We both might have seen it. But as a rule Mr. Murphy would make a statement for Mr. Peake, and he would make a statement for me at the same time.

Q. At any event, you kept one statement made on or about May 20, 1917? A. Yes, sir.

Q. Is that true?

A. I kept a number of them.

Q. I am not talking about any others. I am asking about that one. Did you keep that one, or not?

A. Yes, sir. I have a supplementary satisfactory statement on or about that date.

Q. And you saw that after the time that the corporation had actually been finally dissolved? You have seen it since then?

(Testimony of C. L. Boss.)

A. I had all my papers, and kept them all, and turned them all over to Mr. Weldy.

Q. Answer my question. Did you see this so-called satisfactorily estimated statement of May 20th or thereabouts since the dissolution of this corporation?

A. Yes, I called their attention to them when I turned them over.

Q. You called Mr. Weldy's attention to that particular one?

A. No; all the memorandums.

Q. Well, I don't ask about any others now. I am asking you about this one. Confine yourself to this one. Did you or did you not call Mr. Weldy's attention to that so-called satisfactorily estimated statement of May 20th?

A. Not any one particular statement.

Q. Well, was that statement among the number that you called to Mr. Weldy's attention? [174—99]

A. I took my statements to him and called his attention to what I had. I cannot tell you whether that particular one I called his attention to.

Q. Was that one among the ones you called attention to? A. Yes.

Q. Why did you have your attorney serve demand upon us for it?

A. Because I had an idea that Mr. Peake had the same thing too.

Q. You had an idea there were two of them?

A. Why, Mr. Murphy almost invariably made



(Testimony of C. L. Boss.)

them in duplicate, and if Mr. Peake had kept his statement, why, he would have had the same thing that I had.

Mr. REILLY.—Will you waive the reading of that bill of sale at this time?

Mr. SMITH.—Yes, we waive it.

Q. Now, in making up these satisfactorily estimated statements, particularly that one made up around the end of the month of May, did you take into account pages 159-a and 159-b of your Journal?

A. You don't understand. That could not be. That was the total at the end of May. Now, we took into account the balances on the book on the accounts as we went along. Now, if we would make one out in the middle of the month, we would bring everything up to date as nearly as could be possible. It was not possible to have a statement at the middle of the month represent the exact true conditions without these little current bills.

Q. Well, is it your idea, then, that pages 159-a and 159-b of the journal were made at the end of May, 1917?

A. Yes. Yes, those are the balances of the accounts in the book; and from those balances and prior dates was drawn the [175—100] satisfactorily estimated statement.

Q. So it is your idea that these two pages were made on the last day of May or the first day of June?

A. No, the bookkeeper generally has momentary business, and he gets his balance when he can get



(Testimony of C. L. Boss.)

it. He may get his balance at the end of the month, and he may be delayed in getting it and do his work under the date that is in the book. Now, if a bookkeeper has people at the counter to wait on, business to wait on, he has to take care of that momentary business. Then he goes back to his book when he can get there, and the book balances are as of May 31, 1917.

Q. When do you think this sheet composing the two pages was made?

A. Just as soon as Mr. Murphy could get to the balance and make it.

Q. That doesn't tell us anything. When do you think it was made? A. Right after May 31st.

Q. How many days or hours or whatever you want to say?

A. In other words, for me to tell what date he got his balance off?

Q. If you know.

A. I don't know. He might have got it off that night; might have got it off next day.

Q. He might have got it off three weeks later?

A. Well, that is possible but not probable.

Q. So that you cannot use these sheets 159-a and 159-b in figuring out the statement of the business as you did in explaining it to the Court?

A. Yes, you can. You can use the balances on the book, and these are balances on the books of May 31st. Now if you want the [176—101] balance of May 20th, you have to take the record of May 20th. And there are some memorandums,

(Testimony of C. L. Boss.)

copies that would go into the balance of May 20th that you would not have those memorandums at this time. But you cannot go and talk about these balances at the end of the year and take those total amounts and talk about some prior time.

Q. What do these satisfactorily estimated statements look like? Were they on white paper?

A. Yes, sir.

Q. Or scratch paper? A. Oh, no.

Q. Ruled paper? A. Yes.

Q. Loose leaf, cut for loose leaf entries?

A. No, regular office paper, sometimes about as long as foolscap paper.

Q. Made with typewriter or pen?

A. Mr. Murphy would make them with his pen. He was an accountant.

Q. Were they in substance the same as 159-a and 159-b except for different times?

A. Oh, no.

Q. Entirely different?

A. You don't get the idea of it. The book there itemizes the business down to a detail of each time; and at the time that they wanted the statement, they would bring off the profit down to that date, take the expense account to that date, and then if in the middle of the month you had allowed for current overhead bills, if at the end of the month you got all of those bills in and paid for, you can have a more definite statement than you can in the middle of the month. [177—102]

Q. Now, as a matter of fact, Mr. Boss, what was

(Testimony of C. L. Boss.)

the value of the assets of the corporation on May 31st? Take whatever books you want, and tell us that. What book do you want?

A. I want all of them.

Q. All right.

A. Not counting the salaries, the books show a profit of \$52,746.64, of which \$2,746.64 was estimated current bills, service on automobiles, profit and loss on endorsements, the business liabilities of that present day, leaving the net profit after that statement of \$50,000—not net profit; net in the business.

COURT.—What are those figures you gave there? A. As profit?

COURT.—Yes. A. The profit was \$20,000.

COURT.—I know; but you gave figures there fifty thousand.

A. No, the amount in the business. As I understood, the amount in the business.

Mr. REILLY.—The assets in the business. He said profits, but he meant assets.

A. Yes, if I said profits I meant assets.

COURT.—What is that asset?

A. \$52,746.64, of which \$2,746.64 was current liabilities.

COURT.—Yes, I understood that.

Q. Your profit and loss account in your ledger shows a profit of \$22,746.64? Is that right?

A. Yes, sir.

Q. All right. Now, that profit was estimated, was figured, or [178—103] was placed on the books

(Testimony of C. L. Boss.)

after allowing for the deduction of the salaries of both you and Mr. Peake, was it not?

A. That is what I said, without counting salaries here when I made the statement.

Q. In other words, after the salaries were paid?

A. Yes, sir.

Q. And after Mr. Peake was paid for the desk and chair? A. Yes.

Q. The profit shown on your books at that time was \$22,746.64?

A. Not taking into consideration the current bills, the service on the cars, the profit and loss on the notes that were indorsed that were out.

Q. Let me get at it in a different way, then. You assisted in making the final return to the Government on behalf of the corporation?

A. No.

Q. On the strength of which the \$12,000 tax was assessed?

A. No. I only signed it at the request of the Government's auditors. I never assisted in it at all.

Q. All right. You have admitted in your answer that the net profit of the corporation for that period, for the first five months of 1917 was the sum it is alleged in the complaint to be.

A. That I had no objection to it.

Q. You have admitted it to be that sum, have you not, and have already paid half of the tax on that basis?

(Testimony of C. L. Boss.)

A. The Government demanded it, and I thought it was right; paid it; believed it was just.

Q. You thought it was right?

A. Believed it was.

Q. Now, this figure which is left in the amended bill, this [179—104] allegation you have admitted to be true, and you still admit it, do you not, that the entire net—

A. I don't understand what the amended bill is. You will please explain.

Q. Well, it is the complaint, the amended complaint; the last one which was filed which you had to answer. It alleges the entire net income of the Boss & Peake Automobile Company, a corporation, received by it from all sources during the time from January 1, 1917, to June 1, 1917, subject to the payment of such tax imposed by the provisions of said Revenue Act of 1917, and the Revenue Act of 1916, was \$22,549.94. You admit that?

A. The books here show the income from the time the corporation started, and the Government report shows the income from January 1st to May 31st, and Mr. Weldy segregated the income from the time the corporation started until January 1st, and his findings I signed as a stockholder without question; paid my proportion without a question, believing it to be correct.

Q. His findings were that the profit during December was six hundred and four dollars and some cents. Is that right?



(Testimony of C. L. Boss.)

A. I am not sure as to that amount.

Q. And that during the first five months of 1917 the profits were twenty-two thousand five hundred odd dollars?

A. If Mr. Weldy—if those are his figures, why, I presume that they are right. I don't question it, because he found some items in here that were carried in the expense account; like furniture and fixtures, and he corrected these books. They were not under my supervision during the time of the corporation. [180—105]

Q. So that these bills payable, etc., these current bills payable, etc., that you are talking about, didn't have any effect to reduce your book profit?

A. Yes, it did. I will show it right here in these books that have been submitted.

Q. All right.

A. For a month, so that we could find out what they amounted to, the copartnership ran an account, and the reason they ran an account was Mr. McRell didn't know whether he could put in \$8000 or \$5000, and when he found out that he could not put in but \$5000 before the month was up, we agreed to absorb in the different current accounts this service, the profit and loss on the notes, and those things. Now here is an account here, showing it ran for a month; there is the \$597 of losses, expenses, liabilities carried over that was in the month; and we didn't run it for a month, and against that was set off some credits here.

Q. Amounting to how much?



(Testimony of C. L. Boss.)

A. \$159.18 and \$597. If that account had run, it would have absorbed more than \$2700, or at least that amount of money, because automobiles that had to be repossessed, and profit and loss account, accounts at a loss, and everything else would have eaten it up. Now, this includes such items as storage, insurance, many items of service on automobiles that were out, and commission paid to somebody. What are these items?

Q. This is June 8th, used car account.

A. That is cut out. It was a mistake.

Q. This one? A. Yes; commission.

Q. This B. D. Ball? [181—106]

A. There is a loss on that account. What is this?

Q. Insurance, cars.

A. Insurance out; those current items could not be gathered up by that stated period of the balance, and continued on, and the liability of them continued, and we ran that account a month to find out what the amount would be; then we didn't run it after that month, because we saw it would not only eat up that allowance for those different items, but in all probability amount to a little bit more than that.

Q. Now, let's see what became of this item which you show in your books here, profit of \$22,746.64, after the salaries were paid. Now, what became of that money, that \$22,746.64? Show me on the books.

A. That item divided and held in abeyance to

(Testimony of C. L. Boss.)

find out how much interest Mr. McRell would take in the business.

Q. Show me on the books, then we will have our explanation. What became of them on the books?

A. There it is right there.

Q. You are referring to profit and loss?

A. Yes, sir.

Q. Show me what became of the \$22,000.

A. I will show you on the books; let me find it first.

Q. Tell me first what this entry shows, the three of them that relate to the disposition of that money.

A. That shows the net amount, without those items in, of profit went to Mr. Peake.

Q. How much? A. \$10,000.

Q. How much to Mr. Boss? [182—107]

A. That shows that half of that amount was held in abeyance on my account for myself.

Q. Answer my question, Mr. Boss.

A. \$11,373.32.

Q. What does it say in front of that?

A. C. L. Boss.

Q. Now, then, what is the next item?

A. It says surplus, \$1373.32.

Q. Now, then, turn to C. L. Boss personal account. What is the date, first, of those items that I have just called to your attention on the profit and loss account?

A. May 31st, the first two, and June 1st the second.

(Testimony of C. L. Boss.)

Q. Now, then, turn to C. L. Boss' personal account. Now, where is June, 1917?

A. That don't go there; it goes in the stock account.

Q. Then let's turn to the surplus account.

A. The stock account. That is the stock account on the current ledger there.

Q. Then it was not transferred to the personal account of C. L. Boss at that time?

A. Yes. The personal account of May 31st; profit and loss credit; that leaf right there.

Q. Was it transferred to C. L. Boss' personal account? A. Yes.

Q. Well, show it to me.

Mr. SMITH.—What is it you are asking for?

A. Personal capital account.

Mr. MAGUIRE.—No, we are not asking for that at all. It is a personal account right there in that book.

Mr. REILLY.—I am asking him if it was credited to [183—108] the C. L. Boss personal account. A. No.

Q. All right. Now, then, turn to surplus. Now, this amount was—

A. \$1373.32.

Q. Transferred to surplus, was it, \$1373.32?

A. Yes, sir.

Q. What became of that amount?

COURT.—What is that amount there?

Mr. REILLY.—\$1373.32.

A. And half of that overhead, your Honor.

(Testimony of C. L. Boss.)

COURT.—He asked you what became of that.

A. That was divided in proportion to the interest in the copartnership between Mr. McRell and myself when it was determined the amount of money Mr. McRell could put up, and this account after it ran 30 days was discontinued, and the new copartnership absorbed in the going records the service, they absorbed in the going records profit and loss, as we went along, and those current items that came up like as I have shown in 30 days would keep coming, you see, after it was determined that Mr. McRell could not get the \$8000 that he hoped to get—he could only get \$5000, and I got \$33,500—then it was known that he would have that per cent of interest in the copartnership, and then instead of keeping so many accounts and not knowing just which account to put those different things in, some might get in the wrong account, we decided to absorb the losses and expenses that that money was set aside for in the current business as it went along. We kept the account for one month to see what they would amount to; and even before the profit and loss items came [184—109] in it was decided to cut it out, save bookkeeping.

Q. These profits that you cut up, the surplus was credited to the personal accounts of yourself and R. J. McRell, weren't they?

A. Yes, according to our individual interests, because the business which is our individual interest was to absorb those liabilities.

Q. Yes; but the profit, the surplus, so-called sur-

(Testimony of C. L. Boss.)

plus, from Boss & Peake, a corporation, was divided between you and McRell personally, and it is so shown upon the books under item of R. J. McRell and C. L. Boss personally, is it not?

A. Items as surplus to offset a liability were credited to ourselves because ourselves would absorb in the going business according to our percentages. It being a copartnership, the business would stand those shrinkages if we let it run into the current business at that time instead of running into a special account. And so we didn't continue the special account of those shrinkages. We did only continue it for 30 days. We were satisfied that if you have got to put service in one place on a Maxwell car and then something else in another place, and storage and insurance, etc., on your books, you would likely get your books mixed. There was no reason why we should keep two accounts, make two records on our books, and continue a record that at that time seemed to us needless, useless and an extra amount of work.

Mr. REILLY.—We will offer in evidence, if the Court please, the following item from the personal account of R. J. McRell in the ledger, under date of June 30th: "Division of surplus B. & P. A. Company, \$377.11."

Will there be any objection to the first one offered, [185—110] Mr. Smith?

Mr. SMITH.—All I am going to object is, I am going to ask for the entire account to go in; one item won't explain itself.

(Testimony of C. L. Boss.)

Mr. REILLY.—Then I am going to offer, if the Court please, the following item from the account of C. L. Boss personal, under date of June 30th: “Division of B. & P. Surplus, J 181, \$996.21.”

Mr. SMITH.—We have no objection to the whole account going in.

Q. Now, you did pay the various obligations of the Boss & Peake Automobile Company, did you not, as they arose?

A. Current business obligations, yes, sir.

Q. Well, any obligations that arose, you paid them, didn't you?

A. Current business obligations.

Q. Well, were there any that arose that you didn't pay?

A. Never paid this tax, because it was not a current business obligation that we knew anything about, and didn't assume and didn't know anything about it.

Q. You didn't pay the tax. Is there any other obligation? A. Not that I know of.

Q. Well, you know perfectly well there was not, don't you? A. Yes.

Q. And when this tax question came up, did you then consult with Mr. Peake?

A. I went down to the local office—

Q. Answer my question.

A. No, I didn't consult with Mr. Peake; no, sir.

Q. When did you first have any communication with Mr. Peake on the subject of this tax? [186—111]



(Testimony of C. L. Boss.)

A. When the Government sent me the notice I took and mailed it to Mr. Peake so he would get it at the same time that I did.

Q. When was that?

A. I guess the notice will have to explain. I got a letter back from him acknowledging it.

Q. When was that?

A. Just after they made the demand.

Q. In August, 1920?

A. The records will show when the demand is. I don't remember.

Q. Is this the letter that you wrote to Mr. Peake?

A. "I have just received notice—" Yes, sir.

Q. And that is dated what?

A. August 12, 1920.

Q. And that was the first communication you had with Mr. Peake about this tax?

A. I believe it was. I think so.

COURT.—That was August 12, 1920?

Mr. REILLY.—August 12, 1920, yes, your Honor.

Q. Now, long before you wrote this letter to Mr. Peake, long before you had any communication with Mr. Peake, you and your attorney had been filing affidavits and writing letters and having conferences with the income tax people, or with the taxing people to try to get one half of this tax assessed against Mr. Peake, were you not?

A. I believe we were, if I remember right now.

Q. What? A. I believe we were.

Q. Well, you know you were, don't you?

(Testimony of C. L. Boss.)

A. Well, as far as those dates are concerned, the records will show. You ask me up here; I can't just remember the dates.

Q. Well, you know that you were making these returns to the [187—112] Government, or these affidavits to the Government, and interviewing the taxing authorities long before the Government made the demand on you which caused you to write the letter to Mr. Peake, don't you?

A. Yes; yes.

Q. Months before?

A. The minute that the demand was made, if I recall right, I wrote that letter, as it states in the letter the demand had just been made, and I sent it on to him.

Q. But during the time that you and Mr. McRell were making these affidavits shown in Government's Exhibit 3, in fact, as far as a year before, you were writing letters. Just answer that, if you will. You were writing letters and making claims to impose a part of this tax upon Mr. Peake, and without any consultation or any reference to him? Is that right?

A. I was writing letters explaining the situation. These letters followed a letter written by Mr. Logan at the time we should first make our return, asking for a decision from the Government as to my responsibility in the matter; and this is one of the letters that followed, stating the facts that the Government wanted so as they could make their decision. I did go down at the proper time

(Testimony of C. L. Boss.)

and ask the local office my liability in the matter. They were unable to give me a satisfactory explanation. And then I went to Mr. Logan's office, and asked him to write a technical letter asking for a decision, and that I took it in person down there, and Miss Julia Kern pasted that letter on the report and sent it on to Washington, because at the local office they could not give an answer. And these other letters and correspondence carried on between that time and this time were brought out by the [188—113] Department asking information and I did write and answer their letters.

Mr. SMITH.—Mr. Reilly, will you let me call the witness' attention to the date of that letter you just inquired about?

Mr. REILLY.—The date of the letter is September 6, 1919.

Q. Is this the minute-book of the Boss & Peake Automobile Company?

A. Yes, sir; these are the records of the Boss & Peake Automobile Company, constituting the constitution, by-laws and minutes.

Mr. REILLY.—We will offer the entire book in evidence.

Mr. SMITH.—We will object to that offer, if the Court please. Your Honor can see that an entire book offered in evidence without interrogation as to any particular part, without directing the witness to any particular part, is very unfair to the witness. If counsel has any particular part of this record he wants to call to the witness' at-

(Testimony of C. L. Boss.)

tention, or if he will designate what point he has in mind against it, so we can examine the witness on it, I have no objection.

Mr. REILLY.—I have nothing against the book. In fact, I have a very fond regard for the book.

COURT.—It cannot aid the Court to put that whole book in.

Mr. REILLY.—Your Honor, I am particularly interested in that part of the minute-book beginning with the waiver of notice of stockholders' meeting to be held at the hour of 1:30 P. M. on May 31, 1917.

COURT.—To and including what?

Mr. REILLY.—To and including the—it is rather long, [189—114] your Honor, but it is all essential to show the corporate history of this organization—to and including the meeting of the directors, special meeting of the directors, held at 2:30 P. M. June 22, 1917.

COURT.—Well, let that part go in.

Mr. REILLY.—You will waive the reading of this at this time?

Mr. LOGAN.—Yes, we will waive it.

(Marked Peake's Exhibit "C," running to end of book.)

Q. Now, Mr. Boss, as I understand you, you have stated that the Boss & Peake Automobile Company ceased doing business on the 31st day of May, 1917? A. Yes, sir.

Q. Thereafter the only business that was done was that of the partnership?

(Testimony of C. L. Boss.)

A. Well, Mr. Peake signed a check June 1st before we went to the bank, paying the insurance item to Mr. J. C. Corbin, of the Corbin Company, of \$10.50; outside of that one little transaction, or after we went to the bank, banking hours, there was nothing. I don't even remember anything else on June 1st that was conducted.

Q. Now, when you took the money out of the corporation's bank account— A. Part of it.

Q. On June 1, 1917, and transferred it to your own for the purpose of completing this transaction, did you leave any money in the bank?

A. Oh, yes, there was some. That was only part of the money that was in the bank at that time.

Q. Was there a substantial sum in addition to that? [190—115]

A. There was some. Just what you would call a substantial—I don't know just how much there was, but I know there was enough money for current business at that time.

Q. You transferred this sum to your personal account in what bank?

A. It was just—I cannot recall the way the check was made out, but I transferred it to my own personal account in the First National Bank.

Q. You had had a personal account in the First National Bank for some time prior to that?

A. Yes, sir.

Q. And you continued a personal account in the First National Bank for some time after that?

(Testimony of C. L. Boss.)

A. Had it there for 18 years, run continuously.

Q. And you had other sums in that bank account when you put this sum in?

A. Yes, I had a balance in the bank.

Q. Yes, and you had other sums. You had money left in your personal account after you gave this check for \$26,000 odd to Mr. Peake?

A. Yes, there is three items specified which just cover that \$26,137 some odd cents.

Q. And you had other money in the account?

A. Yes, sir.

Q. And there was other money in the account all the time from the time before you deposited the \$8500 that you got from the corporation, and until after you had given Mr. Peake the check for \$26,000, there was money of your own in that account all of that time?

A. Yes; we didn't have an account of the new copartnership, and that was used as a means for an end. [191—116]

Q. Now, these books show, particularly the combined cash and journal don't seem to show any change in the business between May 31st and June 1st, do they?

A. They were not run very good.

Q. Well, answer my question. Do they, or do they not? A. Yes; yes, they do.

Q. The books show?

A. In the final books. The original entries don't show very good, but then the final books show it all right.



(Testimony of C. L. Boss.)

Q. The combined cash and journal, it was run on from day to day, was it not? A. Yes.

Q. And wasn't made up later? A. No.

Q. This was made as the business was handled?

A. That was under Mr. Peake's directions, with Mr. Murphy as bookkeeper.

Q. After Mr. Peake got out, it was under your direction? A. Yes.

Q. And it was handled right as the transactions happened? A. Not necessarily.

Q. Well, within a very short time?

A. The bookkeeper sometimes may be delayed in entering up his items, he may be just a little careless, but they show in the books, and the result.

Q. There is no distinction or differentiation or change whatever between the 31st day of May and the first day of June in so far as the appearance or form of entries is concerned, is there?

A. Yes, there is very distinctly, in the journal.

Q. In this combined cash and journal? [192—117]

A. Not in the combined, but in the journal.

Q. That is what I am asking you about. I am not asking you about the journal.

A. Where they should be there.

Q. This combined cash and journal runs along as though it were the book of the Boss & Peake Automobile Company for some time, don't it?

A. No, sir; just runs along like loose leaf systems of books generally run along.

Q. Let me call your attention to the 19th day of

(Testimony of C. L. Boss.)

June in this book, and which is shown on page 136 of the combined cash and journal, and call your attention to an item there reading as follows: "Clearing account transfer from Boss & Peake Automobile Company to C. L. Boss & Company," evidently meaning C. L. Boss Automobile Company, and ask you to explain that item on June 19th.

A. I guess I will have to have the Government auditor explain this, because I didn't keep the book. The idea is this: that clearing account—Mr. Murphy had an adjustment account, when his books didn't balance he charged the difference into it, and this clearing account here is new to me at this time. I don't know just the significance of that. I guess I will let the Government auditor answer that, because he checked the books for the corporation and checked the books for the copartnership, and what clearing account is—that is a new one to me.

Q. You don't pretend to say that is an adjustment account that had been carried on by Mr. Murphy?

A. I don't say what that is at all. I want the Government auditor to explain. I don't know at this time what it is. [193—118] It seems at this time it is beyond my recollection what that clearing account is.

COURT.—What is the amount of it?

A. \$4223.91.

Mr. SMITH.—\$4223.91?

Mr. MAGUIRE.—Yes.

(Testimony of C. L. Boss.)

Mr. REILLY.—We would like to offer the item that I read to your Honor on page 136 of the combined cash and journal in evidence.

COURT.—You will have to have a page in there to refer to.

Mr. REILLY.—We will offer the page in evidence.

(Marked Peake's Exhibit "D.")

Mr. REILLY.—We will also offer in evidence page 119 of the combined cash and journal, calling attention particularly to the following item under date of June 1st: "C. L. Boss," and under the heading General Ledger Charges, \$8537.15, shown by check No. 2595, for the same amount.

(Marked Peake's Exhibit "E.")

Q. What is that, Mr. Boss, which was charged to you on the first day of June in the corporation's books? A. That was a check charged to me.

Q. Check from whom?

A. Boss & Peake Automobile Company.

Q. For the amount that you paid, this amount you were telling about?

A. Together with the check Mr. Peake made and the money I borrowed, so that the dissolution and division could be made at that time; just a book-keeping item of the copartnership, which three items made up the total sum that was given to Mr. Peake, in distribution and dissolution of the physical assets [194—119] of the Company.

Q. That occurs in this combined cash and journal of the day preceding the entries relating to the

(Testimony of C. L. Boss.)

charge to Mr. Peake of \$10,000 and \$15,000 and salary, to which you referred in your direct testimony, doesn't it?

A. The entry is entered the day previous.

Q. That is the entry of this charge against you on account of the check given by the corporation is entered the day previous to these other transactions? A. The transaction—

Q. Answer the question first, and then explain.

A. Yes, sir. The transaction was made the same day. Momentary occupation of the bookkeeper caused him to enter the other transaction a day later than when it took place.

Q. How do you know what momentary transactions the bookkeeper had?

A. Because it was carried into the balance as May 31st, part of the next day's transaction. The next day's transaction, the original entry of the salaries was entered a day too late. May 31st it was placed back in the final balance as of May 31st, and the books show it was entered June 2d.

Q. Now, Mr. Boss, you were unable to explain to us a moment ago this clearing item, what that sum represented? A. Yes.

Q. I called your attention to page 136, which is marked Peake's Exhibit "D." Now, let me call your attention to page 135 of the same book, where this same item appears, and opposite it is found check No. 2804. Now can you tell us what that is? [195—120]

(Testimony of C. L. Boss.)

A. No, I cannot. I don't see anything here that would say what it was for.

Q. It shows that check was written for the amount? A. No.

Q. Doesn't it, isn't there the check number?

A. No; no.

Q. What is that column headed?

A. Yes, that is check number, yes.

Q. That shows that check was issued for that amount, does it not?

A. Yes, it would indicate that, yes.

Q. And page 136 shows that it was issued to the C. L. Boss Automobile Company from Boss & Peake Automobile Company, does it not?

A. That shows it was charged to C. L. Boss Automobile Company.

Q. And shows that it came from Boss & Peake Automobile Company, does it not?

A. It indicates that from the bookkeeping here, yes, sir.

Mr. REILLY.—We offer the preceding page, page 135.

(Marked Peake's Exhibit "F.")

COURT.—What was the date of that?

A. June 19th, your Honor; both of them June 19th, this clearing account.

Q. Now, Mr. Boss, to leave that for a moment and turn to this conversation which you had at the depot, with Mr. Peake. You say that Mr. Peake met Mr. McCornack, Sales-manager, was that his title? A. Yes, sir.

(Testimony of C. L. Boss.)

Q. Of the Hudson Motor Car Company, at the depot?     A. Yes, sir.

Q. When Mr. Peake arrived at the depot, he met Mr. McCornack. [196—121] Did he find anybody with him?     A. Mr. McRell and myself.

Q. And was Mr. Peake at the depot in response to an invitation from yourself or Mr. McRell, or Mr. McCornack?     A. No, sir.

Q. How long had Mr. McCornack been in town at that time?     A. He came in the day before.

Q. How much of the time between the day before and the time that Mr. Peake met Mr. McCornack at the depot had you been with Mr. McCornack?

(Objected to as incompetent, irrelevant and immaterial.)

(Objected overruled.)

A. I had been with him in the afternoon and evening of the day before, and considerable of the time that day.

Q. Did you meet him on his arrival in town the day before?     A. Yes, sir.

Q. Did you meet him at the train?     A. Yes, sir.

Q. Did you take him to the place of business of the Boss & Peake Automobile Company?

A. No, sir; he didn't want to go.

Q. Did he go there at any time during the time he was in town on that trip?

A. No, I could not get him to go.

Q. You tried to get him to go?

A. I did. I tried to have him meet Mr. Peake.



(Testimony of C. L. Boss.)

Q. You besought him to go up and meet Mr. Peake, and he refused to do so?

A. A number of times. [197—122]

Q. When you say a number of times, you mean during those two days? A. Yes, sir; I did, yes.

Q. He absolutely refused to meet Mr. Peake.

A. Absolutely. He absolutely refused several times to meet Mr. Peake.

Q. How long before Mr. McCornack left town was it that Mr. Peake discovered him at the depot?

A. About 35 minutes.

Q. About 35 minutes before he left town?

A. Yes; the train was late.

Q. How many times had Mr. McCornack been out here in Portland during the life of the corporation before this date? A. Hadn't been out here.

Q. Never had? A. Not to my knowledge.

Q. It was his only visit to the city of Portland during the history of the corporation?

A. Yes, sir.

Q. And on that one visit he didn't go near the place of business of the corporation?

A. And he would not go near it.

Q. And he would not go near it? A. No, sir.

Q. And he refused to meet the owner of half of the stock of the corporation? A. Yes, sir.

Q. Then, as I understand you, Mr. Peake came down and broke into the happy gathering that you and Mr. McRell—by the way, what was Mr. McRell's business in the corporation at that time?

A. He was not in the corporation.

(Testimony of C. L. Boss.)

Q. Was he a salesman there? [198—123]

A. He was the representative of Boss & Peake in the territory, making contracts with the dealers in the territory.

Q. And how much of the time that you were with Mr. McCornack during his two-day visit here was Mr. McRell with him likewise?

A. Until about the evening time, when Mr. McCornack dismissed him and took me up to his room in the hotel.

Q. And gave you a drink?

A. No, he don't drink. Mr. McCornack would get offended if anyone offered him a drink.

Q. That sounds improbable with that name.

A. He is a Scotchman, not an Irishman.

Q. All right. As I understand, Mr. Peake came down to the depot where you and Mr. McRell were bidding Mr. McCornack good-bye?

A. Yes, sir; waiting for his train, which was 35 minutes late.

Q. If his train had not been late, Mr. Peake would have arrived just after he had left?

A. Just about the time it would have pulled out. He came there just about the time it was due to go out.

Q. He immediately attempted to get Mr. McCornack to turn over the agency for the Hudson car to him personally?

A. Not immediately, no. He went after me right in front of Mr. McCornack. That is what he im-

(Testimony of C. L. Boss.)

mediately did. I said, "Tell it to Mr. McCornack. He is here. Tell it to him."

Q. Tell what to him?

A. He said if the Hudson Motor Car Company would listen to him, Mr. Peake, they would look at it in a different light, because he was a financial man.

Q. Look at what in a different light?

A. What he called the controversy between himself and myself. [199—124]

Q. Well, didn't he specify what that controversy was?

A. Oh, he started in at me with several things. I don't remember just the detail, but he held me responsible for Mr. McCornack not meeting him, right there.

Q. Of which you were entirely innocent?

A. Absolutely.

Q. So at that meeting the sale or arrangement, or whatever you call it, was perfected?

A. Not until Mr. McCornack had left to board the train, and not until—he didn't leave until Mr. Peake had made his overtures for the Hudson agency, and had been questioned by Mr. McCornack, and Mr. McCornack had given him his reply.

Q. What were these so-called overtures that Mr. Peake had made? What were they? What did he say?

A. He said that if the Hudson Motor Car Company would listen to him they would look at it in a different light.

(Testimony of C. L. Boss.)

Q. Is that all he said?      A. No; no.

Q. What else did he say to Mr. McCornack in the nature of overtures? Let us have it.

Q. That he was a financial man; that he was the one that was responsible. To give his words, I don't just recall, except in a few lines. Mr. McCornack turned to him quickly—

Q. No, wait. I want to get what Mr. Peake said. Never mind what Mr. McCornack said. What did Mr. Peake say?

A. He says, "If the Hudson Motor Car Company would listen to me, you would look at it in a different light." Mr. McCornack braced up, and said, "I am the Hudson Motor Car Company."

Q. Never mind what the Hudson Motor Car Company said. I want to know what Mr. Peake said. Did he say anything else you remember?  
[200—125]

A. Yes, he wanted the Hudson agency; but I cannot remember his words.

Q. He stated to Mr. McCornack at that time that he wanted the Hudson agency?

A. Would like it.

Q. What?      A. Yes, sir.

Q. That is what he said?      A. Yes, sir.

Q. That he wanted to get the agency and run the business himself?

A. Well, he didn't say he wanted to run the business. He wanted to get the agency. That would follow, that he wanted to run the business.

(Testimony of C. L. Boss.)

Q. Mr. McCornack refused to give him the agency?

A. Mr. McCornack asked Mr. Peake what part of the work he was doing there.

Q. Yes; and Mr. Peake said, what?

A. Explained what he was doing; and Mr. McCornack said he understood that he was financial man, and he would think, as financial man his time was worth more than the work he had been doing for the Boss & Peake Automobile Company.

Q. Let me call your attention, Mr. Boss, to an affidavit that you made to the Government, in respect to this tax matter, found in the photostat copy which has been marked "Government's Exhibit 3," in which you state that thereafter—after having detailed the formation of the corporation—"That thereafter"—"Hereafter," it says; it should be thereafter, "And at the outbreak of the great war the said E. W. A. Peake became alarmed as to the future, and particularly as to the financial market condition of the automobile business and sought thereafter either to control the whole corporation or to bring about a dissolution or liquidation thereof." Now, then, do I understand [201—126] that you still—

Mr. LOGAN.—You want to read the balance of it.

Mr. REILLY.—The balance of it has nothing to do with the question I am asking him. I can read your whole oration that you delivered here in attempting by ex parte proceedings, to which we

(Testimony of C. L. Boss.)

were not invited, to make the Government think that we ought to pay your tax, but I don't think we have to. You can argue that to the Court.

Q. Do you still subscribe to the statement contained in your affidavit and the similar statement contained in your various answers in this case, to the effect that Mr. Peake was alarmed at the state of the automobile business, and at the same time subscribe to the statement that he went down and tried to get the agency away from you, to try to run it himself alone?

A. Yes. It was the difference between the way an automobile man looks at it and a financial man. He wanted to sell automobiles and then order them from the factory. I was ordering automobiles, based on experience, according to the demands of the business. And Mr. Peake would get so alarmed at the number of automobiles that I was ordering that one time he told me that he walked by his home three times—didn't know when he got home, didn't know where his home was—he was so worried. Now, then, I used to get out all the contracts with the dealers, all the contracts of automobiles sold at retail, and show him that—the number that was shipped and the number that was on hand and the number that was ordered, and then take these and show [202—127] him what would be left, and our liability would only be what was left.

Q. Let me interrupt you there, Mr. Boss, in your speech.



(Testimony of C. L. Boss.)

A. He would take and figure the dollars and cents of the total amount and the amount was so much that it would really paralyze him. Now then, he was looking at it from a dollars and cents point, and I was looking at it from the sales end.

Q. As a matter of fact, in that transaction you were making him put up extra capital out of his pocket, keeping the business going and keeping the cars moving, weren't you?

A. It was what he agreed to do, and what he received a compensation for doing; and he did that when he told me he had ready money, and when he didn't he took the loan from the bank.

COURT.—Did he take the loan for himself or for the corporation?

A. He took the loan for the corporation—had the corporation take the loan. And when he had ready money, he would take it from his ready money.

COURT.—That is, he would loan it to the corporation?

A. Yes, sir; and get interest on it, and get security for it.

Q. Now, as a matter of fact, the amount which Mr. Peake got, and the amount he agreed to take in that conversation at the depot, was \$25,000 even, plus the salary which he said he had earned? Is that right?

A. It was not. It was never mentioned.

Q. \$25,000 was never mentioned?

A. Never mentioned. [Neither was his stock mentioned. He said, "I must have my salary, I

(Testimony of C. L. Boss.)

must have the capital, I must have my net profits, which I estimate on the business to be \$20,000," leaving that difference between twenty thousand and some twenty-two thousand, over \$2000, to cover the [203—128] liabilities.

Q. So he said that he wanted a sum which you say, by a system of mental arithmetic or the system of words he used, was an even \$25,000, out of the transaction? A. No, sir; I did not say that.

Q. Plus his salary? Is that right?

A. I do not say that.

Q. That is what he got, isn't it?

A. No, sir; it isn't.

Q. Didn't he get \$25,000 plus his salary, plus this little amount for the desk? A. No, sir.

Q. How much did he get?

A. The time he made that statement I brought it up, and the next day after the transaction Mr. Murphy entered it in the books in his own handwriting, just as Mr. Peake demanded it, and just as I accepted his demand.

Q. How much money did he get?

A. \$26,137 and some cents.

Q. Isn't that \$25,000 plus the salary plus allowance for the desk and chair?

A. No, sir; that is an afterthought.

Q. Isn't that what it is?

A. No, sir; that is an afterthought.

Q. What do you mean by an afterthought?

A. When the excess war profits were taxed he

(Testimony of C. L. Boss.)

went back and covered the period. That is a thought that came up afterwards.

Q. You still insist the amount he got was not \$25,000 plus the desk and chair and salary?

A. I still insist. [204—129]

Q. All right. Now, when this contract was drawn by Mr. Logan, by which you offered to buy; or rather asked him to sign, giving you an option to buy his stock in the corporation on July 1st, the value to be fixed by an inventory, didn't Mr. Peake say to you that he would not sell on an inventory basis, that there would be no sharpening of the pencil when he came to sell out?

A. No, sir.

Q. No such conversation occurred at all?

A. No, sir. That don't say on inventory. That says on open account and inventory. That means he would get everything—profit, capital and everything.

Q. This speaks for itself.

A. That was his proposition, not my proposition.

Q. Drawn by your attorney?

A. I took it down to my attorney and had him draw it out on his proposition and brought it up to him.

#### Redirect Examination.

Q. Mr. Boss, referring to page 119, there is one question I don't believe has been asked of you yet. I overlooked it in direct, and I think counsel in cross-examination also. You spoke in your direct examination of Mr. Peake taking eight automo-

(Testimony of C. L. Boss.)

biles, and later there being represented by conditional sale notes and warehouse receipts like these, the aggregate amount of eight at \$1200 each, being \$9600? A. Yes, sir.

Q. Will you tell the Court whether the C. L. Boss Automobile Company ever paid those sums to Mr. Peake?

A. We paid for those notes in addition to this distribution of \$26,137 and some cents. [205—130]

Mr. REILLY.—In addition to it? You mean Mr. Peake got \$35,000?

Mr. SMITH.—Wait, Mr. Reilly, if you please. I will turn him over in due time.

Mr. REILLY.—All right.

Q. Referring to this time on page 119 of this combined ledger—page 119 of this combined cash-book and journal, this charge by check 2595 of \$8,537.15 to C. L. Boss, what is the date of that, please, in there? A. This is entered up as of June 1st.

Q. Is that the same \$8537.15 item that shows up in your deposit slip of June 1st?

A. Yes, sir; that is one of the three items that make the \$26,137.15.

Q. So you took that check and put it in this deposit to make the \$26,000 that went to Mr. Peake?

Mr. REILLY.—What about that check? Have you produced it? Have you produced that check, Mr. Boss?

A. I saw Mr. Steel just for a minute, and he said he thought he could get it all right; but we had

(Testimony of C. L. Boss.)

to leave. We got all these other pages, and by to-morrow morning maybe he will have it all right. In a bunch of old stuff, he don't know just where to look for it, but he is digging after it.

Q. Now, will you please turn to pages 135 and 136 of that combined cash and journal and refer to this item \$4223.91, being check numbered 2804, and state whether one of those entries is a debit and the other a credit—if so, state which is the debit and which is the credit—of the same item?

A. One is a credit and one is a debit.

Q. Which page is the credit and which is the debit? [206—131]

A. The debit is 135 and the credit is 136.

Q. In winding up the old affairs of the Boss & Peake Automobile Company, and transferring the business and the assets over to the C. L. Boss Automobile Company, were you doing that at the time and through the time that these entries were made in that part of June?

A. We were doing it continuously until all the old affairs were wound up. We might have had a note or something of that kind which would run a long time; that is, an automobile might be sold on a note that we would have to take up. It would be a note indorsed by the Boss & Peake Automobile Company, and we would have to take it up. The date that all these old affairs were settled was indefinite; it was continued.

Q. Did you have to handle items as they came up from day to day, from time to time?

(Testimony of C. L. Boss.)

A. Yes, sir.

Q. Counsel was asking you to point out in the combined cash and journal whether there was any closing of the old accounts in that book as between the different organizations.

A. No, sir; it don't have the closing entries in the combined entry with the cash. It has them in the journal, and they are there; and in the ledger, and they are there.

Q. Take first the ledger, and show us where they were closed, if you can, and then the journal.

A. The journal—

Q. Well, the journal comes first, yes.

A. They are entered in the journal and then go into the ledger.

Q. Yes.

A. The final entries on the journal are on pages 159-a and 159-b. [207—132]

Q. Those are all in whose handwriting?

A. Mr. Murphy's, the bookkeeper.

Q. What are the pages they are closed in the ledger?

A. As an illustration, on the Super Six merchandise account—

Q. That is the Hudson Super Six, is it?

A. Hudson Super Six merchandise account, that entry showing \$22,923.79 profit on those individual Hudson cars, carried into this from the sundry account, showing \$22,923, and that amount is \$22,923.79. That is the profit on this account. This is the account where the Hudson car account was



(Testimony of C. L. Boss.)

transferred into the sundry account, and the sundry account profit was transferred to the Super Six merchandise, and in the closing entry the profits from this account were journalized—

COURT.—Journalized first, isn't it, and then carried into the ledger?

A. Oh, yes, journalized first.

Q. The books were ruled off at that time, as we say?

A. Yes. And each individual account was closed up, and the books were closed up at that time.

Q. Now, after May 31st, 1917, did Mr. Peake stay around the former business place of the Boss & Peake Automobile Company?

A. Only the morning of June 1st.

Q. Now, in the cross-examination about your transaction with Mr. McCornack representing the Hudson Automobile Company, it was brought out that he would not meet or did not care to meet Mr. Peake. Did he tell you why? A. Yes, sir.

Objected to as incompetent, irrelevant, immaterial and hearsay; not binding upon Peake. [208—133]

COURT.—I will hear that. I came pretty near asking the same question when you were cross-examining.

A. He said he had sent a representative by the name of Barrett into this territory twice; he had gone all over the state, investigated from the dealers and investigated locally in Portland, and investigated from the members in our institution in

(Testimony of C. L. Boss.)

regard to both Mr. Peake and myself; the trips were made, sixty days' time elapsing between the two trips; and his report Mr. McCornack was acting upon, and he had decided before he came to Portland that he would side with the automobile man and not with the financial man.

Q. Now, Mr. Boss, there is one matter I wanted to clear up in the record. I don't believe that it has been brought out clearly yet. It relates to those three entries, where there is a \$10,000 credit, I believe it is, given to Mr. Peake, and eleven thousand three hundred and something given to you, and another item under that of \$1373. Will you turn to that on the book, please?

A. In the journal?

Q. In the journal. Those three items, you have them before you.

Mr. REILLY.—It is in the profit and loss account of the ledger.

A. Just a minute now. He is asking me.

Q. Referring to the ledger, and the profit and loss account as shown in the ledger, and also the profit and loss account as shown at page 159-a of the journal. A. Profit and loss entry.

Q. Yes, profit and loss entry. The \$10,000 item relates to what?

A. The net profit to Mr. Peake. [209—134]

Q. And the \$11,373.32 relates to what?

A. The net profit and half of that liability on my account. The other half was undetermined at

(Testimony of C. L. Boss.)

the entry, because it was undetermined what Mr. McRell would put into the business.

Q. Of the \$11,373.32 item that is to your account, how much of that was profit? The \$10,000?

A. \$10,000 net profit.

Mr. REILLY.—Just a moment.

COURT.—That was quite leading.

Mr. REILLY.—Yes, and the books show what the item is.

Q. Let us get back here to profit and loss in the ledger. In addition to those two items in the ledger there appears, under date of June 1st, an item called surplus \$1373.32. What is that item, please?

A. That item is one-half of the liability amount after the net profit in the business was estimated from the satisfactory supplemental statements.

COURT.—Why one-half?

A. Because one-half was put into my account, as I was to carry the liability, and the other half was to go to me and to McRell, who were to carry the liability, and he didn't know what his proportion would be, and I couldn't tell him until he decided how much capital he would put up.

COURT.—Mr. Peake had nothing to do with the business after he sold out? He had nothing to do with the business of the new company after he sold out?

A. No, after he took his distribution.

COURT.—How does that affect Peake?

A. How did it affect him?

(Testimony of C. L. Boss.)

COURT.—Yes. [210—135]

A. Why, in the proposition of the dissolution Mr. Peake said he must have his net profit, and he estimated that this over-amount would cover the liability, which was the current business liability; not the excess war profits tax, which we didn't know of; and that current liability was the service on the cars, detailed as I spoke about in that account, and the profit and loss on the notes that we had indorsed. That amount was set aside, that over \$2700 to cover that liability. Now, then, in bookkeeping one-half of that amount set aside was put into my account, and the other part of that was divided between McRell and myself when it was determined the amount of money he could put up, and the reason that we divided that was—

COURT.—Well, you have been all over that. There is no use repeating it.

Q. Why wasn't that \$1373.32 item, which is the exact amount of the excess over \$10,000 that you got in your eleven thousand dollar credit, also charge, why was not that single item there credited to Peake?

A. Because in the distribution he was to have the net profit and take no business current liability, and that \$2700 covered business current liability, as I explained before.

Q. Those two items of \$1373.32 amount to twenty-seven hundred—what is the aggregate of those two thirteen hundred dollar items there?

A. \$2746.64.

(Testimony of C. L. Boss.)

Q. Now, what items did you agree to take care of by virtue of leaving that as it was and not charging any of it to Peake?

A. The current business items; that is, not any excess war profit tax, but what was known in business, the current business items only; the liability of the business, the [211—136] current business items, so that no account lawsuits on current business and the current liabilities that happened in the business, in business transaction, or anything of that nature, would fall back on him.

Q. Suppose, Mr. Boss, that I had bought a Hudson Super Six car from Boss & Peake Automobile Company in April, 1917, would there be any current liabilities on that car estimated in this \$2700 item?

A. Yes, the service.

Q. The service. What does that include? Just explain it to the Court.

A. If your machine didn't work right, you would come up there, we would give you free service for a stipulated length of time; and if your machine didn't work right after the contract time, if there was a defect in it, we would give you the labor and the factory would furnish you the part, so that you would have satisfaction.

Q. Did you and Mr. Peake agree on that sum of twenty-seven hundred dollars and some cents that was set aside for those purposes?

A. At the depot, the amount was just a little over two thousand dollars. On June 1st it amounted to \$2746.64.

(Testimony of C. L. Boss.)

Mr. SMITH.—That is all. I wanted to clear that matter up, if the Court please. I think that is all unless Mr. Boss wants to go ahead with his explanation.

COURT.—I think I understand the situation.

A. The amount did not contemplate any liability not known at that time.

Recross-examination.

Mr. MAGUIRE.—Just a minute, Mr. Boss.

COURT.—You better confine yourself to one counsel. [212—137]

Mr. REILLY.—May we ask permission of the Court for Mr. Maguire to ask a couple of questions?

Mr. MAGUIRE.—I want to ask one question about the books.

COURT.—Very well.

(Questions by Mr. MAGUIRE.)

If you will turn there to the page 120, are those items that are scheduled here, \$15,000 and \$10,000, as charged to Mr. Peake, were those entries upon the books of the corporation?

A. Yes. This item was. It was posted back on the corporation's books and got in the balance of May 31st. That is salary.

Q. I am not talking about salary.

A. And this stock account—

Q. Yes.

A. And this, we are on the corporation. This original entry here, of June, is in the balance as of May 31st. By correct bookkeeping it is a little



(Testimony of C. L. Boss.)

irregular. There are lots of those little irregular entries in the books during that period.

Q. Is this part of the corporation books here, that I am getting at here, including this page 120?

A. The books were the same books, with the exception of the ruling off, closing up; the same stationery, we ran on until we got new stationery, the same as McAdoo *used the* railroad business during the time that he had the railroad.

Q. Now, would you kindly answer the question? Are those entries on this page entries in the books of the corporation? A. Books that were—

Q. No, part of the records of the corporation?

A. This entry is part of the record of the corporation.

Q. All right, sir. Those entries on that page are all part of the records of the corporation, aren't they? [213—138] A. No, sir.

Q. What are they?

A. They are the records, the majority of them of the C. L. Boss Automobile Company, but this one item did not get in. Mr. Murphy did not get the items, item of the day, in order to enter it; but this is his handwriting, and he wrote them the following day in the book, and he wrote them the day beyond what he should have written them. He should have written them as of May 31st.

Q. Look at these bills payable. Are those bills payable there? What is that a charge to—bills payable to what?

(Testimony of C. L. Boss.)

A. That is charged to bills payable on the books of the C. L. Boss Automobile Company.

Q. Is there any distinction there upon your books between bills payable at that time—between bills payable of the C. L. Boss Automobile Company and bills payable of the Boss & Peake Automobile Company? A. Yes, in the ledger.

Q. But those accounts appear prior here to these accounts which you balanced off Mr. Peake's account in the corporation, don't they?

A. How is that?

Q. They appear prior upon your cash-book to the entries upon which you balanced off Mr. Peake's account in the corporation?

A. The entry in this account was out of place, but these books and these books—the final books, not the original entry book—these final books the account was corrected.

Mr. RILEY.—May I ask a further question on a different subject? Mr. Maguire was familiar with that book entry was the reason he wanted to ask it.

COURT.—Very well. [214—139]

(Questions by Mr. REILLY.)

You say, Mr. Boss, that Mr. McCornack said he had sent Barrett out to investigate yourself and Mr. Peake, and he had decided to side in with you as an automobile man. Side in with you on what?

A. On the apparent controversy.

Q. How did Mr. Barrett or Mr. McCornack know anything about any apparent conflict?

Objected to as incompetent.

(Testimony of C. L. Boss.)

A. Mr. Barrett was their service man, with headquarters at San Francisco, and he was sent up into this territory to investigate the condition of the Portland agency. They did not have any sale territory representative on the road at that time.

Q. All right. Who told Mr. Barrett anything about any differences of opinion between you and Mr. Peake?

A. I was ordering goods, and Mr. Peake was canceling them. I suppose that would be enough.

Q. Was there anything else?

A. I cannot recall just the—what would lead the Hudson Motor Car Company to look after their own business. They are very keen on handling their own business and following up any cue. I know that Mr. McCornack told me, when I signed the contract, that he thought I was making a mistake to go in with Mr. Peake.

COURT.—I think you better not go into that.

Q. So that all that you know is that they learned of some apparent conflict?

A. No, that ain't all. If you say that, I want to go on and explain.

Q. All right. Go ahead.

A. Mr. Peake went down to the factory in September, before [215—140] the corporation was formed, to buy an automobile, or there about the time, and as Mr. McCornack said, he bulled his way through and they took a disliking to his procedure.

COURT.—I don't know how that affects this

(Testimony of C. L. Boss.)

case. There was a conflict there. I think that is sufficient.

Mr. REILLY.—All right.

Q. On what date was the check account of the C. L. Boss Automobile Company opened in what ever bank it was put into?

A. I don't recall that at all.

Q. Where is the bank-book of C. L. Boss Automobile Company? A. I will have to investigate.

Q. Will you have that here in the morning?

A. Try to, yes, sir.

Q. What? A. I will try to get it, yes, sir.

Q. Is there any doubt about your ability to get your bank-book?

A. These records were all taken out of our office when we repainted, and dumped into a big box, and I did have a whole lot of trouble in getting what we wanted out of that box, and we had a long time to hunt for it; and not only that, but there were a number of leaves of the current copartnership and records and everything, that could not be found; and not only that, but at the time that the collector checked them up we did not have everything even of our own current business at that time, after June 1st.

Q. What bank did you open the account in for the C. L. Boss Automobile Company?

A. The Lumbermen's National Bank.

Q. That was the first account that the C. L. Boss Automobile Company had? A. Yes, sir.

Q. The Lumbermen's National Bank?

(Testimony of C. L. Boss.)

A. Yes, sir. [216—141]

Q. Now consolidated with the United States?

A. Yes.

Redirect Examination.

Mr. SMITH.—There were two matters the opposition had us bring up I wanted to ask Mr. Boss some questions on.

COURT.—Very well.

Q. I refer to these two sheets you brought in at the request of the opposite side to-day, one marked "Sheet No. 1, C. L. Boss Automobile Company, C. L. Boss Capital Account"; the other, "Sheet No. 1, C. L. Boss Automobile Co., R. J. McRell Capital Account." I wish from those accounts you would tell the Court what capital you have in the C. L. Boss Automobile Company.

COURT.—How does that affect this case?

Mr. SMITH.—In my judgment it does not. I just wanted to explain the matter if the Court cares to see it—get the whole situation. I wanted to make the offer of the explanation. That is all.

COURT.—Were those sheets offered in evidence for the other side? A. They asked for them.

Mr. SMITH.—They were produced at their request. They started to examine Mr. Boss on them and never offered them in evidence.

Mr. REILLY.—Put them in the right place in the ledger and put them in.

A. These are our present business.

Mr. REILLY.—These are not the sheets we asked for at all.

(Testimony of C. L. Boss.)

A. Where did McRell capital account come in? This is the first one he ever had.

COURT.—If they have not been offered that is sufficient. [217—142]

Mr. REILLY.—We would like the witness to produce the capital account sheets of C. L. Boss and R. J. McRell in Boss & Peake Automobile Company.

A. Mr. McRell never was in that, never had any stock.

COURT.—Then you may produce your own.

Mr. SMITH.—This is C. L. Boss capital account in C. L. Boss Automobile Company.

COURT.—I don't see what C. L. Boss Automobile Company has to do with the Boss & Peake Automobile Company.

A. Your Honor, the capital account in the Boss & Peake was capital account—not mine in particular. It was just the one capital account, and it is in this book now, and it is the only capital account there was. It was capital account of \$35,000, and included both capital accounts.

COURT.—What has that to do with this case?

Mr. SMITH.—Counsel asked for them.

Mr. REILLY.—That is not what we asked for.

COURT.—I think it may end here.

Mr. LOGAN.—They asked for capital account of Mr. McRell, and Mr. Boss is exercised over the fact that Mr. McRell never had a capital account.

COURT.—Mr. McRell never was concerned in the Boss & Peake Automobile Company. It was in the C. L. Boss Automobile Company.



(Testimony of C. L. Boss.)

Mr. REILLY.—The minutes connect Mr. McRell up with the Boss & Peake Automobile Company after Mr. Peake had sold his stock, your Honor. I want them to produce the sheet showing it.

COURT.—If you have that sheet, produce it.

Mr. LOGAN.—We will. I want to make an explanation, your Honor. This ledger has the capital account. Mr. Boss is not aware of the whereabouts of either the capital account of Mr. Peake or Mr. Boss. [218—143]

A. There isn't such a thing. It is one capital account. The \$30,000 is in it.

Mr. LOGAN.—There isn't an E. W. A. Peake capital account in it. There is just capital account, including Mr. Boss and Mr. Peake.

Mr. REILLY.—There is a ledger sheet showing there is a capital account of both Boss and Peake.

A. Here is your capital account.

Q. Does this capital account appear regularly in the ledger which has been produced here?

A. Yes.

Q. What page, if at all, is it numbered?

A. This page here.

Q. Is that the capital account of the Boss & Peake Automobile Company? A. Yes, sir.

Mr. SMITH.—We will ask to have it marked for identification, and offer it in evidence, if the Court please.

Mr. REILLY.—No objection.

(Marked Boss' Exhibit "F.")

Mr. MAGUIRE.—Mr. Logan, here in your com-

(Testimony of C. L. Boss.)

bined cash-book and journal you have reference to E. W. A. Peake capital account and C. L. Boss capital account, and neither of them is there—neither of them is entered in the capital account.

Mr. LOGAN.—We will have Mr. Murphy explain that when he comes on the stand.

Mr. MAGUIRE.—They don't correspond.

Mr. LOGAN.—I am just as anxious to get them as you are.

Q. Mr. Boss, this capital account sheet marked Boss' Exhibit "F" was in this book yesterday when we turned it over to the other [219—144] side to investigate? A. Yes.

Q. Do you know of any other capital account sheet of the Boss & Peake Automobile Company, other than the one to which you have referred?

A. No. There is that account there they said don't correspond. You see it is posted as of May 31st into that capital account sheet there of mine; and capital account of Mr. Peake's, I was looking for the other day and couldn't find it. I was trying to find it myself.

Q. And in this capital account that appears here, what is the date of the first entry on the credit side?

A. November 25, 1916.

Q. And those entries continued down to what date? A. To December 14, 1916.

Q. And on the debit side what is the date of the entry? A. Journal entry, where the stock—

Q. June 2? A. January.

Q. I thought it was June.

(Testimony of B. B. Weldy.)

A. Well, I can't say whether it is June or January, 1917.

Excused. [220—145]

**Testimony of B. B. Weldy, for the Defendant  
(Recalled).**

- B. B. WELDY, recalled for defendant Boss.

Direct Examination.

(Questions by Mr. SMITH.)

Mr. Weldy, do you recall Mr. Boss turning over to you when you were investigating this affair the documents and data and records and memoranda of the Boss & Peake Automobile Company?

A. I do. There is a mass of it.

Q. There is a mass of it? A. Yes.

Q. Do you know whether among that mass of documents he gave you there were any of these so-called satisfactory settlement sheets?

A. I presume so. I would not call them by that name. I would term them trial balances.

Q. Trial balances?

A. Yes. Now, they may be under another name, as far as they are concerned, but that is what I would term them.

Q. Trial balances? A. Yes.

Q. In handling the affairs of a corporation what account is there appears in any of the books as a capital account? A. Simply the capital account.

Q. Will you explain what it embraces or to what items it refers?

(Testimony of B. B. Weldy.)

A. It embraces the capital that is invested in the business.

Q. I will show you Mr. Boss' Exhibit "F," being the capital account that appears in this ledger, and ask you to examine it and explain what it means to the Court.

A. It means that on November 25, 1916, there are two items of credits, \$7500 each; on November 28, \$2500; November 29, another \$2500; December 14, two items of \$5000 each, the total of \$30,000 paid in in cash. It all comes through the [221—146] cash-book.

Q. Are there any books here of record to show from whom those sums were derived or paid or by whom they were paid?

A. There should be in the cash-book.

Q. Is the cash-book here, Mr. Boss?

COURT.—Hasn't it been admitted that \$15,000 was paid by one party and \$15,000 by the other?

Mr. MAGUIRE.—Yes, your Honor.

COURT.—What is the use of taking up the time of the Court if that is admitted?

Mr. SMITH.—All I want to say is that is the only capital account that would run through any books of the corporation.

Q. Is that right, or would there be a different capital account?

A. This is all that is necessary.

Q. I will hand you a document and ask you to state what it is.

A. It is a copy of my report to the Department

(Testimony of B. B. Weldy.)

Commissioner of Internal Revenue of the C. L. Boss Automobile Company, dated—

Q. Photostatic copy?

A. Photostatic copy of my report, dated February 27, 1920.

Q. Made after full investigation of all these books?

A. Yes, sir. This was made before I made the examination of the Boss & Peake Automobile Company, beginning January 27th and ending February 10th. The report and examination of the Boss & Peake Automobile Company was made in between here when I discovered that there was such a corporation doing business, or did business before this partnership was in existence. So this report of examination was made by [222—147] myself and a revenue inspector named Butterfield, who has since left the service.

Q. I will refer to page b-8 of this report, to the printed statement in that report, and ask you to read that, please.

Mr. MAGUIRE.—Well, if the Court please, that is not evidence in this case. It would not be evidence against us.

Mr. SMITH.—I am simply asking him to read it.

Mr. MAGUIRE.—I thought you meant read it out loud.

Mr. SMITH.—No, read it to himself.

Q. Can you now tell the Court whether in the examination of the Boss & Peake Automobile Company books upon which you based this statement of

(Testimony of B. B. Weldy.)

the excess income tax in controversy, whether you had a fairly accurate record upon which to base it?

A. Oh, yes; much more than we frequently find.

Q. And from the examination of those books what records did you have access to, showing the expenses, the items that went into it, each particular car as it was received and transferred, and how did you arrive at the profit?

A. I had everything presumably in the office at my disposal; I had a little room to myself, or rather two of us, Mr. Butterfield worked with me three days, and we spent the first two days finding the documents and the books that we thought we would need; and outside of the journal, cash-book, or the combined journal and cash-book and the ledgers I can't recall the exact documents or statements or whatever they might be termed. It is impossible for me at this time to recall what I had.

COURT.—How long did it take you to make up that statement? [223—148]

A. For the Boss & Peake Automobile Company two or three days; then I had perhaps a week after that writing up the report on it.

Cross-examination.

(Questions by Mr. MAGUIRE.)

Mr. Weldy, when you made this investigation you discovered that there had been no inventory taken of the assets of the Boss & Peake Automobile Company as of June 1, 1917? A. Yes, sir.



(Testimony of B. B. Weldy.)

Q. And it was impossible therefore to prepare a profit and loss account? A. That is right.

Mr. SMITH.—Mr. Maguire, excuse me, will you let me ask him one more question, please?

Mr. MAGUIRE.—Certainly.

(Examination by Mr. SMITH.)

Q. Will you turn to page 136 of this journal, combined cash and journal, pages 135 and 136. I want to call your attention particularly to this check No. 2804 for \$4,223.91, that is marked clearing account, and on page 136 the same item appearing under the 19th as a clearing account transferred from B. & P. A. Company to C. L. B. & Company, \$4,223.91. I will ask you whether one of those items is a debit item and the other a credit.

A. They are.

Q. Which is the debit and which is the credit, Mr. Weldy?

A. The first item on page 135 is debit and on page 136 credit.

Q. From your experience in investigating corporate records and as an accountant, what is this account referring to when it says a clearing account? [224—149]

A. That is hard to tell. It is usually the dumping-ground for a number of things, to close up the books at a certain period, or in between periods; and when we find that there is a debit and a credit closing the account we very seldom go into it.

Q. In examining the books of the Boss & Peake

(Testimony of B. B. Weldy.)

Automobile Company, in what condition did you find them?

Mr. MAGUIRE.—I don't see that that would be competent.

COURT.—Do you object to that?

Mr. MAGUIRE.—Yes, your Honor, I do.

COURT.—I think he has already testified.

Mr. LOGAN.—I don't know that he has answered that question, your Honor.

COURT.—No, not that question, but I understood him to say he found them in very good form at some stage of his testimony.

Mr. LOGAN.—I don't recall that, your Honor.

A. I think I did. I think I made that statement, your Honor, yes, sir.

Cross-examination Resumed.

Q. In this matter of clearing account, Mr. Weldy, that shows that there was a check written, doesn't it? A. Yes, sir.

Q. It doesn't show what the check was written to, does it? A. No.

Q. But when you turn over the page here, that explains the transaction, doesn't it?

A. Yes, it appears so. There is more explanation of the credit than there is of the debit. [225—150.]

Q. Now, I want to ask this question: Isn't that where they had taken the money out of the bank account of Boss & Peake Automobile Company and put it over there to the bank account of C. L. Boss Automobile Company?

(Testimony of B. B. Weldy.)

A. I would not attempt to say it was. That is up to the bookkeeper.

COURT.—I want to ask a question. Why does one of those entries appear on the debit side and one on the credit side?

A. I think, your Honor, just as it states there, it is a clearing account for a number of items that have probably come up during the closing of the corporate period, corporate existence. They frequently come up, and then they issue a check to cover it or close it out in some other way. Now, the bookkeeper is the only one that can answer that. I am not competent.

Q. But when you have a clearing account that is a matter of clearing off the books, that does not involve any issuance of any checks, does it?

A. Oh, it might; it might.

Q. You didn't investigate that to trace down the history of that? A. No, I didn't.

Q. Very well, sir, I won't further examine you, then.

Excused. [226—151]

**Testimony of R. J. McRell, for Defendant.**

R. J. McRELL, called as a witness on behalf of defendant Boss, being first duly sworn, testified as follows:

**Direct Examination.**

(Questions by Mr. SMITH.)

Now, Mr. McRell, I will ask you please to speak

(Testimony of R. J. McRell.)

out plainly. Remember it is very hard to hear in this room. State your full name, please.

A. Robert John McRell.

Q. Your age? A. 39.

Q. Your occupation? A. Automobile business.

Q. How long have you been in that business?

A. I have been in the automobile business in Oregon since 1914.

Q. Were you engaged in it before you came to Oregon? A. Yes.

Q. For how long a time and where?

A. Since about 1911.

Q. In the State of Oregon with whom were you associated in the automobile business?

A. I was in business in Eugene when I first came out here myself, and later I went in business with Mr. Boss.

Q. When you say you went in business with him, in what capacity did you go in business with Mr. Boss at first?

A. The first time I was connected with Mr. Boss was as a wholesale representative of C. L. Boss & Company.

Q. Of the old company? A. Yes.

Q. What was your next association with him generally in the business?

A. Well, I continued the same with the Boss & Peake Automobile Company.

Q. And your next association, if any?

A. I became Mr. Boss' partner. [227—152]

Q. What day did you become Mr. Boss' partner?

(Testimony of R. J. McRell.)

A. On June 1, 1917.

Q. Do you know Mr. Peake? A. Yes.

Q. How long have you known him?

A. Well, I never knew Mr. Peake until he came in the business with Mr. Boss.

Q. Were you present at or did you hear any conversation between Mr. Boss and Mr. Peake about Mr. Boss forming a new partnership to take over the business?

A. Of the formation of the Boss & Peake Automobile Company?

Q. The formation of the C. L. Boss Automobile Company. A. Yes.

Q. Did you talk with Mr. Peake personally about that?

A. I talked to Mr. Peake before we all talked together, before we all met, yes.

Q. About what time did you first talk with Mr. Peake about you and Mr. Boss forming the C. L. Boss Automobile Company?

A. Why, it was some time in April, in the spring of 1917; just the exact date I don't just recall.

Q. And from that time on, Mr. McRell, did you talk with Mr. Boss frequently about the formation of a partnership?

COURT.—Mr. Boss or Mr. Peake?

Q. Mr. Boss, first. A. Yes.

Q. Did you also talk with Mr. Peake on more than one occasion?

A. Well, in which way do you mean that?

Q. About the formation of the C. L. Boss Auto-

(Testimony of R. J. McRell.)

mobile Company taking over the business of the old corporation.

A. Well, we discussed it a time or two; not very much at length.

Q. Now, when you talked with Mr. Peake, what did you discuss, [228-153] if anything, about the new partnership? When was it, where was it, and who was present? What was the occasion?

A. Well, do you mean the first time I talked with him?

Q. Yes, the first time is all right; start with that one.

A. Well, there was not very much discussion about it. It was just merely we exchanged ideas about my going in with Mr. Peake and about how he felt—going with Mr. Boss rather, not with Mr. Peake—that we would make a good team together, and would do nicely. As to go into the details of our business, why, there was not very much gone into between Mr. Peake and I.

Q. Well, now, later on, about the latter part of May, 1917, did you have any talk with Mr. Peake about your going in with Mr. Boss?

A. Well, in the latter part of May, of course, when we met at the Union Station, when the conversation came up, when they agreed on their dissolution of the Boss & Peake Automobile Company, I was present there.

Q. You were present at that time, were you?

A. Yes.

Q. I want you to speak up plainly and tell the



(Testimony of R. J. McRell.)

court in your own way what that transaction was, what the understanding was between him and Mr. Boss.

Mr. MAGUIRE.—That he personally overheard?

Mr. SMITH.—Yes, that he personally knows.

A. Well, I was at the Union Station with Mr. Boss and Mr. McCornack, the sales-manager of the Hudson Motor Car Company, who had come here to Portland, as he frequently does, at the time that Mr. Peake came down to the Union Station. Mr. McCornack and Mr. Boss and myself were there when Mr. Peake came in; and he came up and started talking to Mr. McCornack, discussing—  
[229-154]

Mr. MAGUIRE.—Speak louder, please.

A. He started talking to Mr. McCornack at that time.

Q. He—who? Peake? A. Yes, Mr. Peake.

Q. Did you hear what he said to Mr. McCornack?

A. Yes.

Q. What was it, please?

A. Well, he started in to discuss in regard to the Hudson contract.

Q. Tell what was said, as nearly as you can.

A. He also started in discussing with Mr. Boss in regard to the way their business relations had been. And Mr. McCornack evidently was not very much—he didn't care very much about listening to their past difficulties. In other words, his attitude was such that he didn't care anything about that, and he very quickly dismissed the subject.

(Testimony of R. J. McRell.)

Q. What did he say to Mr. Peake?

A. He told Mr. Peake that he was not interested in their discussions, or words to that effect. The exact words I don't just recall. That if he started in to quarrel with anybody he would be quarreling with the Hudson Motor Car Company.

Q. If who started to quarrel?

A. If Mr. Peake started to quarrel with anybody at that time. And at that time he boarded his train, and left the city.

Q. Did you hear any talk between Mr. Peake and Mr. Boss after Mr. McCornack left the city?

A. Yes.

Q. Where was that?      A. At the Union Station.

Q. Same place?      A. Yes.

Q. What was that conversation, please?

A. The conversation was, that Mr. Boss turned to Mr. Peake [230-155] and said that he was blocking the dissolution of the Boss & Peake Automobile Company, and Mr. Peake asked him how that was. And he said that he had taken the money of the corporation and had put it into automobile notes; in other words, had used up the funds.

Q. Who said that?

A. Mr. Boss said to Mr. Peake.

Q. That he, Peake, had taken the money?

A. Yes. And Mr. Peake came back at him very quickly, and said that he would take the notes of the C. L. Boss Automobile Company, that is, he would loan money to the C. L. Boss Automobile Company, and take the new automobiles that was

(Testimony of R. J. McRell.)

controlled by the Boss & Peake Automobile Company.

COURT.—Take them as security?

A. As security for the loan; as I recall there were 8 automobiles—these 8 Hudson automobiles to apply on this loan. And he said that he must have his salary in the deal, and he must have his capital, and he must have his profit.

Q. At that time, did they figure up or discuss what the profits would be?

A. They estimated, as I recall, their profits at \$20,000; and the division of the two, of course, would be \$10,000, divided between the two; that would be the division of the profits.

Q. That was Peake's proposition to Boss?

A. Yes.

Q. Do you know whether that was afterwards acted upon? A. How is that?

Q. Do you know whether Mr. Boss accepted that?

A. Very quickly, right there.

Q. And did you have anything to do with winding up the affair between them? [231—156]

A. No, I had nothing to do with the Boss & Peake Automobile Company.

Q. What time of day was that conversation?

A. It was in the morning. The exact time, it seems to me it was something like around nine o'clock, or something like that; before the train left, anyway.

Q. Of what date, please?

(Testimony of R. J. McRell.)

A. Why, I think it was either on the 21st or 22d of May. Something like that.

Q. After that when did your C. L. Boss Automobile Company actually engage in the automobile business? A. On June 1, 1917.

Q. What did you do on June 1, 1917, about taking charge of the business?

A. Well, on the morning of June, 1917, we met Mr. Peake down at the First National Bank.

Mr. LOGAN.—You mean June 1st, do you not?

A. Yes, June 1st. And there the deal was completed.

Q. What do you mean by the deal being completed, what transpired?

A. Well, the deal was completed according to their agreement that they had down at the Union Station.

Q. What was done, what did they do in carrying it out?

A. Well, Mr. Boss had hustled out and borrowed money on his property to help to make up the amount that he was to pay Mr. Peake, and then Mr. Peake loaned the \$9,600, that was \$8,000, as I recall, that Mr. Boss borrowed, and there was \$9,600 that Mr. Peake loaned the partnership. And then there was some amount taken out of the treasury of the Boss & Peake Automobile Company; I don't remember the figures on it. But anyway they made up the amount between them, which [232—157] came to something—\$26,000, or a little better.

Q. Did they leave the place of business together

(Testimony of R. J. McRell.)

—Boss & Peake go to the bank together, or do you know?

A. I don't know. I don't think they did. I don't believe they did.

Q. Anyway, what did you do on June 1, 1917?

A. Well, from the bank we went down to Mr. Logan's office and there Mr. Logan attended to the details, that is, filing the assumed name of the copartnership.

Q. That is this document here, marked Boss' Exhibit "B"? That is your signature to it, is it?

A. Yes, sir.

Q. And when did you take actual charge of the business, you and Mr. Boss?

A. On June 1, 1917.

Q. Since that time has Mr. Peake had anything whatsoever to do with the business at that place?

A. Absolutely nothing.

Q. Where did you run the business of your partnership?

A. Same place—615-617 Washington St.

Q. Do you know whether the corporation itself ever did any further automobile business at that place after June 1st? A. No, it was dissolved.

Q. What firm has transacted the automobile business at that place since that time?

A. C. L. Boss Automobile Company.

Q. Now, you have spoken of some conversation with Mr. Boss, as I recall it, about April, concerning your going in with Mr. Boss.

A. Yes. [233—158]

(Testimony of R. J. McRell.)

Q. Prior to the time that you had any talk with Mr. Boss about going in with him, did you have any talk with Mr. Peake in which Peake tried to get you to go in with him? A. Yes.

Mr. MAGUIRE.—Objected to. That is obviously leading.

Q. When was that conversation, and where was it, and who was present?

A. As I recall, the conversation that I had with Mr. Peake at that time was in March, I believe, along about the middle of March, I would say from the middle to the latter part. I went to lunch with Mr. Peake, and at that time he was talking to me about going in or taking stock in a corporation to be formed at the dissolution of the other corporation to enter in to the automobile business. At that time he was going to get the Hudson contract, that is the Hudson and Maxwell contract, or use his efforts to get them.

COURT.—How does that affect this case?

Mr. SMITH.—Simply as showing the attitude of Mr. Peake toward Mr. Boss at that time; that was all.

Q. Were those the cars that the Boss & Peake Automobile Company had been handling?

A. Yes.

Cross-examination.

(Questions by Mr. REILLY.)

Mr. McRell, the corporation about which Mr. Peake asked you concerning the taking of the



(Testimony of R. J. McReil.)

stock, wasn't that the Boss & Peake Automobile Company?

A. No. He never said a word about the Boss & Peake Automobile Company.

Q. He was going to dissolve that—under your understanding [234—159] he was going to dissolve that corporation so he could form another corporation?

A. That was the impression I got, if he were able to get the contract; that is, he was discussing doing that.

Q. Mr. Boss also talked to you from time to time about taking stock in the Boss & Peake Automobile Company, didn't he?

A. Never has been a word ever offered from either side to me to take any stock in the Boss & Peake Automobile Company; never has been by anybody.

Q. How about the corporation that was to be formed after the Boss & Peake Automobile Company was dissolved? Did Mr. Boss ever ask you to take any stock in that?

A. There was no corporation to be formed that Mr. Boss ever discussed with me after the Boss & Peake Automobile Company was dissolved.

Q. I am not asking you after the Boss & Peake Automobile Company was dissolved. I am asking you about the period before that. Wasn't there any discussion at any time between Mr. Boss and yourself about forming a corporation?

A. No, sir.

(Testimony of R. J. McRell.)

Q. Didn't you know that Mr. Boss endeavored to peddle stock in that corporation around among several of the employees?

A. Not to my knowledge; he never offered to peddle any to me.

Q. Now, coming down to this conversation at the depot, Mr. McRell, you stated that Mr. Peake said he must have his salary, his capital, and his profit, which he estimated as half of \$20,000?

A. Yes.

Q. Now, just what were the words that Mr. Peake used, as far as you can remember them?

A. Well, as far as I can remember them, that is about as he said. [235—160]

Q. Put it in the first person. That will make it clearer. In other words, put yourself in his place. Use the first person, and see what you get.

A. I will do the best I can. He said—

Q. Put it in the first person.

A. He says, "I will do this" or "I must have my salary"—I supposed he had always got a salary; maybe he had, I don't know—"I must have my capital, and I must have my profits, which I estimate to be \$20,000, or approximately that," as I remember it. Of course, my not being any more than a hired man I didn't pay very much attention to it, because I was not interested in it.

Q. Now, as a matter of fact, didn't that conversation take place at a distance of 40 or 50 feet away from you, and before Mr. McCornack had left? A. No, it did not.

(Testimony of R. J. McRell.)

COURT.—In this transaction was there any transfer of capital stock by Mr. Peake to Mr. Boss? A. No, sir.

Q. In the transaction, wasn't the capital stock indorsed by Mr. Peake and handed to Mr. Boss?

A. They were discussing how they would do it.

Q. Answer my question, yes or no.

A. How is that again?

Q. Answer the question I am asking you. In this transaction wasn't the capital stock owned by Mr. Peake indorsed in blank by him at Mr. Boss' request, and delivered to Mr. Boss?

A. Why, at the bank Mr. Peake indorsed his stock.

Q. And delivered it to Mr. Boss?

A. Where he delivered it I don't know. [236—161]

Q. Didn't you see what became of that stock?

A. No, I don't know as I did. That was a transaction between those people. I had nothing to do with that.

Q. One share was indorsed to you, was it not?

A. Not at that time.

Mr. LOGAN.—You started to make an explanation. If you desire to make an explanation you may do so, if it is pertinent to your answer.

Mr. REILLY.—Explanation of what? All right. Any explanation you want to make.

A. I don't know as it is necessary. I didn't have anything to do with it.

Q. Who was W. H. Bietau?

(Testimony of R. J. McRell.)

A. Why, W. H. was a lady, I guess, that owned a share of Mr. Peake's stock, I think. I don't know.

Q. Well, that share of her stock was transferred to you, was it not?

A. Yes; as means to an end to their dissolution.

Q. Irrespective of the purpose of it, her share of stock was actually indorsed over to you?

A. I guess it must have been.

Q. Well, don't you know that it was?

A. Yes, sir.

Mr. REILLY.—We will offer this stock certificate in evidence.

(Marked Peake's Exhibit "G.")

Q. That certificate is for one share, is it not?

A. Yes; but you don't mean it was endorsed over to me at that time. It wasn't indorsed to me at that time; as the question was, it was not indorsed over to me at the bank.

Q. I don't know anything about when you got the instrument. [237—162] The instrument speaks for itself, and has the indorsement as of May 31st. Now, the stock of Mr. E. W. A. Peake, amounting to 149 shares, this is the stock certificate for it, is it not?

A. I suppose it is. I never saw it.

Q. Didn't you see that and know that that at the time was indorsed to Mr. Boss by Mr. Peake?

A. I saw them transacting their own business at the bank.

(Testimony of R. J. McRell.)

Mr. LOGAN.—We will agree that all of the shares may be introduced in evidence.

Mr. REILLY.—We offer this certificate in evidence.

COURT.—You admit it?

Mr. LOGAN.—Yes, admitted with no objection. (Marked Peake's Exhibit "H.")

Mr. REILLY.—These other two are unindorsed. They are Mr. Boss' certificate and Mr. Murphy's which was indorsed in blank and held by Mr. Boss. I don't know that any particular purpose comes from loading up the record with them, your Honor.

Mr. LOGAN.—We brought it up here in response to your request.

Q. Now, you qualified as a director in that corporation, did you not?

A. I was put in at the dissolution as a—just merely for the closing out of the corporation under Mr. Logan's advice at that time, but I had nothing whatsoever to do with it in any way.

Q. You were made secretary of the corporation?

A. At the closing out, as a means to an end of closing out their corporation.

Q. As secretary you received from Mr. E. W. A. Peake his resignation as secretary and treasurer and director of the corporation, [238—163] dated May 31, 1917, did you not?

A. Why, at the time they were closing out the corporation down at Mr. Logan's office, at the time they voted me in just as a means to an end of the

(Testimony of R. J. McRell.)

closing or the dissolution of it, and I signed up some papers and stuff there and I paid no attention to that, what they were.

Q. Well, you have not answered my question.

A. As to what they were?

Q. That has not anything to do with the question asked you, did you or did you not?

A. I never saw Mr. Peake's resignation.

Q. Did you make up this book?      A. No.

Q. Any part of it?      A. No.

Q. Who did?

A. I suppose it was made up down in Mr. Logan's office, or Boss & Peake made it up. I don't know. I had nothing to do with the corporation.

Q. Did you sign this call for a special meeting of the directors, which call is dated June 14, 1917?

A. I signed a lot of stuff down there when they closed it out, and sure that is my signature, I must have.

Q. You signed this?      A. Yes.

Q. You didn't read it?

A. No. I was voted in and at the time I asked Mr. Logan if it involved me in any way, and he said no, that it was just a means to an end at the dissolution, and under his advice I did that; and I paid absolutely no attention to it, because I had nothing to do with it.

Q. Did you sign this waiver of notice of a special meeting of the stockholders to be held on May 31, 1917, at the office [239—164] of the company? Did you sign that?



(Testimony of R. J. McRell.)

A. My signature—that was all signed at the same time Mr. Boss, Mr. Murphy and myself signed the whole bunch of them down there when they dissolved.

Q. Did you read that when you signed it?

A. No.

Q. You signed a statement headed “We, the undersigned being all the stockholders of the corporation of Boss & Peake Automobile Company—”

A. At the advice of Mr. Logan, I signed it. \*

Q. Is that Mr. Boss’ signature?

A. Yes; and also Mr. Murphy’s signature.

Q. Also Mr. Murphy’s signature? A. Yes.

Q. And your signature? A. Yes.

Q. Are these the signatures of Messrs. Boss, Murphy and yourself on the minutes of the meeting of May 31st?

A. That is the same time. It was all signed at the same time. We had a whole stack of them; and we jollied ourselves about our practice in penmanship in closing out the Boss & Peake Automobile Company. As to what I signed I don’t know, because it was all done there at one time.

Q. You signed the minutes of the meeting of the board of directors held on the first day of June, 1917, at the office of the company?

A. They were all signed at the same time; that is another one of them.

Q. Well, were these meetings held?

A. They were when they were dissolved, they were dissolving.

(Testimony of R. J. McRell.)

Q. Did you hold this meeting that you signed up here as having held? Did you hold that meeting on May 31, 1917? A. Gosh, I don't know.

Q. Did you hold this meeting which you have signed here? [240—165]

A. If it says so, we must have, because it was all up to Mr. Logan that handled those affairs. Now, what he did I don't know. I have got confidence in what he says, and what he tells me, and that is all there is to it.

Q. At that meeting of the board of directors, June 1, 1917, were you elected a director and secretary and treasurer of the corporation?

A. I was elected something with the understanding it was just a means to the end of the dissolution.

Q. But you actually were elected at a meeting on the first day of June, 1917, is that true?

A. I suppose I was.

Q. Did you sign this bill of sale from the corporation to the partnership referred to in the meeting of the stockholders of June 22, 1917?

A. Yes, sir; with the same understanding as all the rest.

Q. Did you read this?

A. No, sir; just a means to the end of the dissolution, why should I read it? I heard their understanding and their deal.

Q. Did you read this certificate, this assumed name certificate?

A. Oh, yes, sir. Yes, that is our own business.

(Testimony of R. J. McRell.)

Q. Oh, you read that?

A. I began to look at that, yes, sir.

Q. That is the only thing you did look at?

A. Why, sure.

Q. You didn't look at this assignment of the assets of the Boss & Peake Automobile Company to the partnership? A. Which?

Q. The assignment—bill of sale or assignment?

A. No. [241—166]

Q. Of the assets that you signed on behalf of the corporation?

A. That is part of the Boss & Peake corporation business that I had nothing to do with.

COURT.—You were acting as director there and secretary?

A. Just at the closing of it out. I was acting under Mr. Logan's advice.

COURT.—I know you were. You were interested to that extent as director and secretary, weren't you?

A. Yes, but as I was saying, that I was informed before I was put in that it was just carrying out of their own deal of a dissolution that they had agreed to; and naturally in a dissolution, as I understand it, which I don't know much about—

COURT.—As those papers were prepared and presented to you for your signature, were you informed what they contained?

A. Oh, yes. I was informed what they contained, yes.

(Testimony of R. J. McRell.)

COURT.—And you signed them with your eyes open?     A. Yes.

COURT.—That is all right.   Go ahead.

Adjourned until 10 A. M.

Portland, Oregon, May 24, 1922.

R. J. McRELL resumes the stand.

Mr. REILLY.—If the Court please, your Honor will remember that the defendant Peake demanded the production of the bank-book of the Boss & Peake Automobile Company. The book which we asked for is the bank-book.

Mr. SMITH.—The bank deposit-book—pass-book?

Mr. REILLY.—Yes. Now, that we have this check-book, we will offer, if the Court please, in evidence a check made by [242—167] Boss & Peake Automobile Company by C. L. Boss, President, payable to the order of C. L. Boss, the amount being \$8,537.15, indorsed C. L. Boss, Charles L. Boss, cleared through the First National Bank. The check is dated June 1st, and cleared June 2d.

Mr. LOGAN.—It is stipulated that this check covers the same amount as noted in Boss' Exhibit "C," which contains the items \$9600, \$8000, \$8537.15, which is the exact amount of this check just introduced.

(Marked Peake's Exhibit "I.")

Mr. REILLY.—We will also offer in evidence the stub in this book of check stubs, evidently a check-book relating to check No. 2804, dated June

(Testimony of R. J. McRell.)

19, 1917, showing the check of \$4,223.91, payable to the order of C. L. Boss A. Company.

(No objection.)

(Marked Peake's Exhibit "J.")

Mr. MAGUIRE.—May it be stipulated that the check there mentioned is the same check which is found in the combined cash-book journal, pages 135 and 136?

Mr. SMITH.—Yes.

Mr. MAGUIRE.—May it be further stipulated that that check was a check of the Boss & Peake Automobile Company?

Mr. SMITH.—I think it is also the stub of a check—well, I don't know as to that.

Mr. LOGAN.—This is the check-book of the Boss & Peake Automobile Company. It needs some explanation, however.

Mr. REILLY.—No objection to your explaining it.

Mr. MAGUIRE.—Can we stipulate upon this further fact that the bank account of the C. L. Boss Automobile Company was not opened until June 19, 1917? [243—168]

Mr. SMITH.—Yes. Will you stipulate the fact that from June 1, 1917, until June 17th or 19th, 1917, when the C. L. Boss Automobile Company account opened at the bank, the new partnership, C. L. Boss Automobile Company, used this bank account to transact its business through?

Mr. MAGUIRE.—No, I won't. I understand that C. L. Boss Automobile Company had no bank

(Testimony of R. J. McRell.)

account whatever, of its own, up to June 17, 1917.

Mr. REILLY.—Without explanation do you admit, to keep us from proving it,—I was just arranging to subpoena the bank officer—do you admit that the C. L. Boss Automobile Company had no account of its own in any bank prior to June 19, 1917?

Mr. LOGAN.—We have already admitted that; but your other question is an entirely different proposition. We did business, however.

Mr. REILLY.—I didn't ask you about that.

Mr. LOGAN.—You did; that was your question.

#### Redirect Examination.

(Questions by Mr. SMITH.)

On yesterday, Mr. McRell, some matter was brought to the Court's attention about the minutes of this corporation in its dissolution; the various documents that you signed. Do you know relatively about what time you got the one share of stock of the Boss & Peake Automobile Company?

A. It was on about the first of June.

Q. And who gave it to you? Who delivered it to you personally?

A. Well, I don't remember who delivered it to me.

Q. Well, now, after that, in signing these papers for dissolution, you understood the contents of each paper, didn't you? [244—169]

A. Oh, yes.

Q. It was fully explained to you what you were doing?



(Testimony of R. J. McReil.)

A. It was fully discussed in the presence of everybody, yes, sir.

Q. And why was it that you went in as an apparent stockholder of the Boss & Peake Automobile Company?

Mr. REILLY.—Objected to as calling for the conclusion of the witness, purely argumentative. The facts speak for themselves.

COURT.—He may answer the question.

A. Why, I was voted in as a stockholder for the means to an end to liquidate the Boss & Peake Automobile Company. That was my understanding of why it was transferred.

Mr. SMITH.—I would like to introduce the file your Honor has on the desk. The gentlemen have introduced a certain number. With their permission we will introduce the certificate of dissolution.

(Marked Boss' Exhibit "G.")

Mr. REILLY.—It is not in there. I wanted to offer that, but I didn't find it if it is.

COURT.—Isn't that admitted in the pleadings?

Mr. SMITH.—Yes, it is admitted.

COURT.—Very well, then, the certificate is not in issue.

Mr. REILLY.—Yes. I don't know the date of it.

COURT.—I was looking at the pleadings just now. I thought I noticed it.

Mr. REILLY.—The dissolution is admitted. They have alleged in their complaint in some of

(Testimony of R. J. McRell.)

their affidavits that the dissolution occurred on June 1st, and the date of the instrument itself is important, if we have it, your Honor. It was somewhere around, [245—170] I think, I don't know, somewhere the end of June.

COURT.—About the 22d.

Mr. REILLY.—That was the date of the stockholders' meeting, but I think the dissolution certificate was later. It was July 17th, I believe.

Mr. LOGAN.—Here it is. It was sent to Salem, and finally came back on July 17th.

COURT.—You are introducing that, are you?

Mr. LOGAN.—The gentleman stipulated. However, we may introduce it for the purpose of the record.

(Marked Boss' Exhibit "G.")

Recross-examination.

(Questions by Mr. REILLY.)

Just one question, Mr. McRell. If you took this share of stock solely for the purpose of assisting in dissolving, why did you take part of the assets of the Boss & Peake Automobile Company, part of the surplus account?

A. Part of the surplus account?

Q. Part of the surplus account, yes.

Mr. SMITH.—When do you claim he took that, Mr. Reilly?

COURT.—Permit him to answer the question, then you can inquire.

A. I don't know which account you refer to.

Q. Don't you remember that you took part of

(Testimony of R. J. McRell.)

the surplus account of the Boss & Peake Automobile Company.

A. I remember, if it is the account you refer to; the amount that was set aside by the Boss & Peake Company to take care of their adjustments of notes and stuff like that.

Q. You know, Mr. McRell, that the income of that corporation for the five months ending May 31st was \$22,500 after the [246—171] salaries were paid, don't you?

A. That is what the book says. That is what was brought out here, yes.

Q. And a tax, part of a tax has been paid by Mr. Boss on that basis?

A. Yes, Mr. Boss paid his part, yes.

Q. Mr. Peake got only \$10,000 in addition to the par value of his stock plus his salary that is not included in that sum, didn't he?

A. That is what he asked for, yes.

Q. Yes. And out of the remaining \$2250 you took a part of that, didn't you, and it went to your personal account, and you were given personal credit by that part of the profits? Isn't that true?

A. It was put in after the account had run for something like a month or something like that, to see what the amount of their adjustments or their debts, as you might say, might be, or bills, or whatever adjustment accounts. And then it was put in to clear itself out through our account.

(Testimony of R. J. McRell.)

Q. But you took credit for it in your personal account, didn't you?

A. Well, I don't know how it is on our books. It has been so long since I saw it, I never thought of it again.

Q. Let me call your attention to your personal account in the ledger.

A. Yes. \$377.11, surplus account.

Q. Did you or did you not take part of the profits? A. Yes, it is on my account.

Mr. REILLY.—One other question I wanted to ask this witness, if the Court please. [247—172]

Q. Now, Mr. McRell, when you made this affidavit concerning this stock transaction, whatever it was, when you made the affidavit to the tax collector, did you know of the facts which you put into that affidavit?

Mr. SMITH.—Objected to unless he is shown the affidavit, given a chance to refresh his memory from it.

Q. I am not asking about any item.

COURT.—He ought to know whether he did know those facts or not.

A. If I made an affidavit I certainly would know the facts. I don't remember them now, because it has been so long ago.

Q. Well, your affidavit, according to this exhibit, was made on the 23d day of August, 1920.

A. Yes.

Q. Was it made after an investigation of the facts? A. Yes.

(Testimony of R. J. McRell.)

Q. And your books at that time showed that the Boss & Peake Automobile Company's account was, assets were at least equal to \$30,000 plus this \$22,540 odd dollars profit earned in the first five months of 1917, plus the \$604 profit earned in December, 1916, did it not?

(Objected to as incompetent.)

A. I never paid any attention to the Boss & Peake books.

Q. You didn't? A. No, sir.

Q. Well, then, what did you mean by making an affidavit that Mr. E. W. A. Peake—and I will show it to you—received in settlement \$26,137.15, which was one half of the value of said assets, as above set out, together with the value of a certain desk.

A. Because that was their agreement, and I saw him get it at the bank. [248—173]

Q. Why did you make an affidavit that that was one half of the assets of that corporation, if you didn't look into the books?

A. Well, because taht is what it foots up to.

Q. Then you did look into the books?

A. Yes, I saw their balances, yes, but not to go all over it.

Q. Let me give you this profit and loss account. That profit and loss account before the payment of these sums to Peake and Boss and the surplus account which eventually went to you and Boss shows \$26,746.64, does it not? A. Yes, sir.

Q. And the salaries have been already taken out,

(Testimony of R. J. McRell.)

and that amount is over and above salaries, isn't it?

A. Yes, I believe it is.

Q. Well, you know it is. If there is any doubt you can check over general expenses. You know it is, don't you? A. Yes.

Q. All right. The capital of that corporation was not impaired, was it?

Mr. SMITH.—Objected to as incompetent. That is for this Court to conclude.

COURT.—I will overrule the objection.

A. Would you ask the question again?

Q. The capital was still intact?

A. You mean on the first day of June?

Q. I mean prior to the time this transaction took place. I am not trying to trap you into anything whatever. A. Yes, I think it was.

Q. So that at the time this transaction took place, the assets of this corporation were at least \$30,000 plus \$26,746, were they not? [249—174]

A. Yes.

Q. After the salaries had been paid, is that true?

A. Yes.

COURT.—He has answered that.

Mr. REILLY.—I wanted to be sure he understood it fully, your Honor.

Q. Now, if that is true; if the assets of that corporation were at least \$52,746.64 after the salaries had been paid, how do you explain your affidavit that Mr. Peake in receiving \$26,137.15, which included his salary, received half of the assets of the corporation?



(Testimony of R. J. McRell.)

A. Well, he received that less this adjustment account.

Q. Did you say anything about any adjustment account in your affidavit?

A. Well, I don't know.

Q. Well, read it.

A. I don't remember anything about this. It has been too long.

COURT.—Well, it is a fact, is it? It does or does not say so.

Mr. REILLY.—No; there is nothing in there about it. I will not require you to explain, but it speaks for itself.

Redirect Examination.

(Questions by Mr. SMITH.)

You said something about less the adjustment account, Mr. McRell. What did you mean by that expression?

A. Well, I meant that in their agreement at the station where Mr. Peake was to receive his profit and his capital and his—to make up his \$26,000, there was a balance set aside by them in their own transaction of something like \$2200 or something,—[250—175] I don't just remember the exact amount, to take care of what might be done. As to the bookkeeping part, I never paid any attention to that, because it was not my part of the business, never has been, and isn't to-day.

Q. Before you made the affidavit and while you were there, did you examine this page?

(Testimony of R. J. McRell.)

Mr. REILLY.—Object to his being coached what he examined. Let the witness say for himself what he examined, if the Court please.

COURT.—He may call his attention to it.

A. Yes.

Q. 159 and 159-a and 159-b of this—is that the journal or ledger? A. That is the journal.

Mr. SMITH.—The pages I have just called his attention to are the pages that we were over so thoroughly with Mr. Boss I thought no further question could arise with this.

Q. I will show you the combined cash and journal at page 120. Had you also seen that sheet?

A. Yes.

Q. And based upon all of them, you made the affidavit, did you? A. Yes.

Q. Having in mind this adjustment account?

A. Yes.

Q. Now, do you know how and when the credit to your individual account that was shown you arose, the little credit relating to some distribution of assets of the former Boss & Peake Automobile Company? A. Do you mean the date?

Q. Yes. Do you know about when it was? [251—176]

A. No, I don't remember the date.

Q. Can you turn to your account here, please, and find it. A. On June 30th.

Q. June 30th of what year? A. 1917.

Q. How did that credit arise?

A. Well, to eliminate a lot of bookkeeping and

(Testimony of R. J. McRell.)

keeping separate accounts. We tried it out for one month, and averaged what their adjustments were, and to save carrying an additional account it was all thrown in and let wear itself out or take care of itself in time.

Q. You had only one share of stock? A. Yes.

Q. You spoke of the entire aggregate assets of the Boss & Peake Automobile Company as being \$52,746.64. Can you give us three or four items that will make that sum up? How was it made up?

COURT.—I think you have been over that. It is taking up time.

Mr. SMITH.—Very well, if the court understands it. That is all. That is our case.

Excused. [252—177]

### **Testimony of E. W. A. Peake, in His Own Behalf.**

E. W. A. PEAKE, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. REILLY.)

You are one of the defendants in this case, Mr. Peake? A. Yes, sir.

Q. When was the first word you heard about this tax?

A. Well, I forget the date. It was that letter that you have spoken of in the testimony, received from Mr. Boss.

Q. That letter received in August, 1920?

A. Yes.

(Testimony of E. W. A. Peake.)

Q. Had you received any prior communication from Mr. Boss or anyone else on the subject?

A. No.

Q. Now, when you received this envelope addressed to you and containing this notice and demand for tax, addressed to the Boss & Peake Automobile Company, some number on Washington Street, did you and I wait upon Mr. Walker in the Collector's office? A. Yes, sir.

Q. What, if anything, was said in that conversation about the return made by the Boss & Peake Automobile Company, and the basis of this tax?

A. Well, as I remember it, Mr. Walker explained that Mr. Logan and Mr. Boss had made certain representations which had induced him to divide that tax. [253-178]

Q. Was any one present besides yourself and Mr. Walker and myself? A. No.

Mr. SMITH.—Object to any further testimony of the conversation, if the Court please.

COURT.—Mr. Walker has been on the stand.

Mr. REILLY.—This is not impeachment, your Honor. The question I am leading up to is to disclose that Mr. Walker was asked whether he had given permission or whether he had refused to permit us to examine the return of the Boss & Peake Automobile Company. He admitted he had, as I recall it. Then he was asked whether or not he had made a demand and he said he had sent these letters. And he denied remembering whether we had asked him particularly to make a demand on

(Testimony of E. W. A. Peake.)

us so that if we paid we would not be doing a voluntary act and have no rights. And I am merely asking the witness leading up to that to show that he refused to do so.

COURT.—Oh, very well. You may ask that. That was what I supposed you were trying to get at.

Mr. REILLY.—Yes, your Honor.

Q. Leaving out, then, the question of the examination of the return, I don't care so much about that, was anything said about the Government making a demand upon you to pay the tax? Was any request made by you or myself in your behalf, at that time, in conversation with Mr. Walker?

A. We asked Mr. Walker to see the returns, which he agreed to give us, and then came back and asked me if I were a stockholder of the concern, and I said no. Then he says, "I can't show you the returns." [254-179]

Q. Well, was anything said about the Government making a demand on you instead of sending you a demand on the Boss & Peake Automobile Company?

A. Well, I don't know. My memory is not clear on that. I know there was a conversation, but what it was I don't exactly know.

Q. I think maybe we can save time by starting apparently in the middle of this. When was the first question discussed between you and Mr. Boss relative to either of you disposing of his stock or in any other way getting out of the company?

A. That was on about the time that Mr. Boss

(Testimony of E. W. A. Peake.)

made that proposition in writing to get control of the stock.

Q. And you are referring, when you say that, to Peake's Exhibit "A"?

A. Yes. It was about that time. That was about the 26th day of March; probably a few days before that.

Q. Did you at that time offer to sell to Mr. Boss on an inventory basis?

A. Not on an inventory basis, no.

Q. Was that instrument drawn in its terms according to your request, or otherwise?

A. No, that was a suggestion of Mr. Boss'.

Q. And did you have any conversation respecting the way in which you would sell out, if you ever sold out, with Mr. Boss     A. Yes.

Q. When?     A. At that time.

Q. And what was that conversation?

A. That I would sell my stock in the company.

Q. Did you have any conversation relative to whether any sale that you would have would have anything to do with an inventory basis? [255-180]

A. No. I was always opposed to any inventorying that stock. I always expected to sell for a lump sum.

Q. Now, how were matters getting on at the office between you and Mr. Boss in the management of the business?

A. Well, they were rather strained.

Q. And how about this visit of Mr. McCornack? How did you come to go to the depot?



(Testimony of E. W. A. Peake.)

A. Well, I was informed that Mr. McRell and Mr. Boss had had Mr. McCornack in town for a day or so. And they had him at the hotel; they were with him at the hotel. And I telephoned the hotel, and they said he had checked out and had gone to the station. So I went down there and found them standing just prior to the time Mr. McCornack left—a few minutes.

Q. Then what happened when you got there? Just tell the Court in your own way just what happened.

A. Well, the atmosphere was very chilly. Mr. McCornack while I had only seen him once before in my life was civil and that was about all. He said he understood that I had been trying to give Mr. Boss the worst of it to that extent. And I told him I had no such intention. There was very little said. There was very little time to speak of anything. I could see that the man was thoroughly opposed to me, and I had no chance with him whatever, so I dropped out of it. And I am not sure then whether it was after Mr. McCornack's departure or before that I called Mr. Boss off to one side. My impression is that it was before. And I asked Mr. Boss—

Q. Just a moment. When you say you called him off to one side, do you mean you called him away from Mr. McCornack and Mr. McRell both?

A. Absolutely; so we could talk privately, as no person else [256-181] was interested in our business.

(Testimony of E. W. A. Peake.)

Q. All right. What was the conversation?

A. I asked—Mr. Boss' intention was to make me a proposition to go out on July 1st; and I asked Mr. Boss if he would be able to get his money together by June 1st. He said he would. Well, I says, "I will make you a price then. I will make you a price of \$25,000 for the stock," and I would expect the salary credit to be paid. Mr. Boss says, "that is perfectly satisfactory," and we left at that, and that was all the conversation, and it didn't take any longer than I have taken in telling you now.

Q. Was anything said in that conversation about any adjustment account?

A. Absolutely nothing said about any adjustments of any kind.

Q. Was it considered in that conversation or at any time, any such adjustment account as has been mentioned here?

A. The first I heard of an adjustment account was here.

COURT.—Where?

A. In the courtroom here.

Q. Prior to this transaction at the station, Mr. Peake, had you consulted with any attorney respecting the manner in which you should dispose of your stock, if you disposed of it?

A. Yes, I had consulted with Mr. Maguire.

Q. You had consulted with Mr. Maguire. And what was the nature of that consultation?

A. Well, I asked him if there would be any—

(Testimony of E. W. A. Peake.)

Mr. LOGAN.—Wait a moment. A consultation between him and his attorney is self-serving.

Mr. REILLY.—I think it is a matter that was made at the time when there was no thought of this tax, and if the testimony is that he went to his attorney and his attorney explained to [257-182] him that a certain method was the proper method for him to adopt, and he did adopt it, I think it is proof, in other words, of the transaction that the witness went into.

COURT.—Were you advised as to how you should dispose of your interest there?

A. Yes, I was advised by Mr. Maguire how to dispose of that.

COURT.—What was the advice?

A. I asked Mr. Maguire if I transferred my stock if I would be liable. He asked me if it was fully paid for. I told him it was. He asked me if I had indorsed or guaranteed any of the debts of the company. I told him no. He said, "Then all you will need to do is to transfer your stock and have Mr. Boss take the stock over," transfer it to himself.

COURT.—That was the method you had in mind of disposing of your interest?

A. That was the method I had in mind of disposing of my interest.

Mr. LOGAN.—We withheld testimony of an attorney on our side. If this goes in, we would like to put in evidence, as to the closing of this corpo-

ration, on the advice Mr. Boss received from his attorney.

COURT.—You may do that.

Mr. MAGUIRE.—There will be no objection.

COURT.—This question is simmering down to the sole question as to how the interest of Mr. Peake was disposed of, whether it was for taking the stock and a settlement on that basis, or whether it was a direct sale of Mr. Peake's stock to Mr. Boss.

Mr. HUMPHREYS.—That is not the Government's position. The Government's position is this: The Government taxes income on a corporation. Wherever we find income we can impose a tax on it. [258—183]

Mr. REILLY.—That is not your complaint.

COURT.—That is another question.

Mr. HUMPHREYS.—Yes, it is. The question, as the Government contends, here to determine whether or not judgment shall go against Mr. Peake, is whether or not Mr. Peake in this transaction got assets out of the corporation. Whether it was a sale of stock to Boss or in distribution and dissolution, is immaterial. This is equity.

COURT.—There are two angles to this question, one is that of the Government against Boss & Peake corporation and against the stockholders of that corporation, that is the angle of the Government.

Mr. HUMPHREYS.—That is all I am interested in, of course.

COURT.—The angle of the other side is, as to the disposition by Peake of his interest in the corporation, whether it was a disposition of the stock or whether it was a settlement according to the assets.

Mr. HUMPHREYS.—Of course I am only interested in the Government's claim as against the individuals. I am not interested in the controversy between the parties.

COURT.—Mr. Peake might be liable to the Government; at the same time, between Boss and himself he might be otherwise liable.

Mr. MAGUIRE.—I take it those matters will be elaborated on the argument.

Mr. HUMPHREYS.—I wanted to make clear the position of the Government.

Mr. LOGAN.—We take the same position as the Government does. It doesn't make any difference on the facts of this case, as will develop on cross-examination of this gentleman. If the [259—184] assets of this corporation went to Mr. Peake whether he sold the stock or whether he was dividing the assets, he is responsible.

COURT.—Suppose Mr. Peake had sold his stock to Mr. Boss and this corporation had run on for six months, there would not be any question.

Mr. LOGAN.—If the corporation had gone on for any appreciable length of time.

COURT.—It did go on for a day at least; for several days.

Mr. LOGAN.—Yes. But the tax was not in ex-

(Testimony of E. W. A. Peake.)

istence at that time, and they could not have the matter in contemplation.

COURT.—I am not indicating my impression now. I am only stating the issue to get counsel to conform themselves to the issues, so the court can be better advised.

Mr. LOGAN.—I want to correct myself for a moment. It didn't go on for a day even, as a corporation. There was a check signed the next day.

COURT.—That is the question in the case. I know your position about it.

(It might be admitted that both parties had advice in this case from counsel; that they were acting on advice, as far as that is concerned.)

Mr. REILLY.—I don't believe we would admit, your Honor, that prior to this transaction Mr. Boss had any advice from Mr. Logan that what he was doing with Mr. Peake would constitute dissolution.

COURT.—It is only getting at the minds of the individuals when they were transacting the business.

Mr. SMITH.—You want to see if the minds met.

Mr. LOGAN.—Mr. Logan was in the matter from March. [260—185]

Mr. REILLY.—He didn't give that advice.

Q. Now, in that conversation was there anything said as to how the money was to be raised that should be paid to you?

A. No, nothing that day at all.



(Testimony of E. W. A. Peake.)

Q. That was May 21st, wasn't it, Mr. Peake?

A. I don't remember the exact date. I am taking your dates for it.

Q. When was the transaction actually completed?

A. Well, it was either on the first day of June or the last day of May.

Q. And in that transaction, what did you get?  
[261—186]

A. Well, I got a check from Mr. Boss for the full amount that was agreed on.

COURT.—What was that?

A. A twenty-six thousand dollar check.

Q. What did the check comprise? In other words, what item went to make up that amount of \$26,137.15?

A. You mean, what I was being paid for?

Q. Yes.

A. There was the stock \$25,000, my salary, and while not mentioned at the station that day, when I was going out they did add a desk and some chairs that I had there, which was private property.

Q. Is it the salary and the desk and chairs that prevents the amount from being an even \$25,000?

A. Yes, that is what makes the difference.

COURT.—Desk and chairs, what do you mean by that?

A. I had a desk of my own and some chairs.

Q. Now, what did you give in return?

A. I assigned my stock and gave it to him.

Q. When you say you assigned it, in what way did you assign it?

(Testimony of E. W. A. Peake.)

A. I asked what he wanted.

Q. I don't mean that. What was the physical thing? A. I assigned it in blank.

Q. That is you indorsed it?

A. Indorsed it in blank, yes.

Q. Did you deliver it to Mr. Boss? A. Yes.

Q. What about Miss Bieteau's stock? You owned that, didn't you?

A. I owned that, and I delivered that up at the same time.

Q. Indorsed by Miss Bieteau?

A. Indorsed by Miss Bieteau. [262—187]

Q. Did Mr. Boss accept these certificates of stock?

A. Yes, sir.

Q. Did you lend any money in this transaction to any one?

A. Yes, I loaned Mr. Boss some money.

Q. How much? A. I think it was \$9600.

Q. What security, if any, did you take for that loan?

A. Well, I think that it was warehouse receipts mostly on Hudson cars.

COURT.—Warehouse receipts?

A. Warehouse receipts, I believe.

Q. Were there some title papers, either promissory notes or title papers also?

A. Yes. Mr. Boss' notes were secured by these warehouse receipts, or cars, or whatever it was. I had Mr. Boss' notes for \$9600, as I remember it, and that was secured by title notes, or I think it was warehouse receipts. I have no record of that.

(Testimony of E. W. A. Peake.)

Q. You have no record of the documents themselves now?

A. Not of the documents themselves, no.

Q. Let me hand you two documents which have been identified, marked Boss' Exhibit "D," and ask you if those are two of the notes you took at that time? A. Yes, sir.

Q. It has been stated, Mr. Peake, that you took the eight cars themselves and sold them back to the partnership. Is that a fact? A. No, sir.

Q. What was your transaction respecting the cars? A sale or what?

A. Well, I expected to get my money in cash, but at the last [263—188] day—I think it was about the 30th—Mr. Boss said that he had been disappointed in some of his money; and I was very anxious to get the thing closed up, so I suggested that I would loan him the money to make up the amount, the \$9600, on this security.

Q. Now, it appears that those notes that you have there, that were just referred to, are signed C. L. Boss Automobile Co. Do you know whether they were signed that way at the time?

A. Yes, I knew they were signed C. L. Boss Automobile Co.

Q. They were signed that way at the time?

A. Yes, sir.

Q. How did you come to take the notes signed C. L. Boss Automobile Company?

A. Well, Mr. Boss was owner of all of the stock in the company; I was getting warehouse receipts;

(Testimony of E. W. A. Peake.)

and whether it was the company or Mr. Boss owned the security, I didn't give very much thought. I considered them perfectly good.

Q. Had there been, prior to this transaction, any conversations between you and Mr. Boss concerning your name after you sold your stock? A. No.

Q. The use of your name in the business?

A. There was never any discussion on that at all.

Q. Did you at any time, in any part of these transactions, insist, or did you request that the corporation be dissolved? A. Absolutely not.

Q. Did you care whether it was dissolved or not?

A. No, I did not.

Mr. LOGAN.—Objected to.

Mr. REILLY.—Your complaint says that he insisted upon dissolution. I think it is only fair to ask the witness [264—189] whether he cared whether it dissolved or not.

Q. Did you know, prior to this tax question arising in 1920, in the summer of 1920, whether the corporation had been dissolved or not?

A. No, I really didn't know.

COURT.—Had you anything to do with the organization of the C. L. Boss Automobile Company?

A. No, I had nothing to do with that at all.

COURT.—Never had any interest in it in any way? A. Never had any interest in it at all.

Q. That note of 'Boss' of \$9600 was paid and the security returned? A. Yes, sir.

Q. Now, it has been stated that you received in

(Testimony of E. W. A. Peake.)

this transaction your salary, the small sum for your desk, \$25,000 for your stock, and eight automobiles. Is that a fact?

A. Why, no. The twenty-six thousand dollars paid in full, without any automobiles.

COURT.—Is that your position, Mr. Smith—that he received eight automobiles?

Mr. SMITH.—Yes, your Honor. I think we can show the court he did.

Mr. REILLY.—In addition to the twenty-six thousand dollars?

Mr. SMITH.—I will explain his position by him, and he will admit it in three minutes, or before I get through with him. This man went to the bank with Mr. Boss when Boss made out this deposit slip, and he will not deny that; that he knew every cent that went into that deposit slip, which aggregates \$26,137.15. [265—190]

COURT.—Do you claim that Mr. Peake got these automobiles out of the corporation?

Mr. SMITH.—He did, yes.

COURT.—In what capacity?

Mr. SMITH.—He took it for himself.

COURT.—He took it for himself and became the owner of the automobiles?

Mr. SMITH.—He took it for himself, and he sold it back to us on these conditional sale notes. When we paid him the notes, we paid him for them.

COURT.—Did he take automobiles as security or as purchase?

Mr. SMITH.—That I will leave for the court to

(Testimony of E. W. A. Peake.)

determine when the facts are shown. I think it will come out very clearly on his cross-examination. Anyway, he got the money out of them, whether he took them one way or the other.

Mr. REILLY.—It is well for us to know, your Honor. He even conceals the intention he had.

COURT.—You go ahead with your examination. I was rather surprised.

Mr. REILLY.—I am also, your Honor. It came out of a clear sky to me yesterday.

COURT.—Very well.

Mr. LOGAN.—This involves the Government's contention, too.

COURT.—I don't think there is much left for the Government. It seems to be clear.

Mr. SMITH.—All the Government needs is its money.

Q. All right, Mr. Peake. After you disposed of your stock and received this check, did you go near the business any more? A. No, sir. [266—191]

Q. Were you ever in their place of business after that time?

A. I think I walked into the place the next morning for something. I wasn't in there over a minute, and I haven't been in the place since.

Q. Did you go with them to Mr. Logan's office at any time? A. No, sir.

Q. Either before or after this transaction?

A. No. I have never met Mr. Logan before.



(Testimony of E. W. A. Peake.)

Cross-examination.

(Questions by Mr. HUMPHREYS.)

Did you know at the time that this matter was concluded, Mr. Peake, I mean on either the 31st of May or the 1st of June, that the corporation of which you had theretofore been a part was going to continue or was not going to continue in the automobile business?

A. I did not know anything about that at all.

Q. You did not know whether the business was to be continued by the partnership?

A. I didn't know whether it would be continued as a corporation or as a partnership. When he acquired the stock, I felt that I was through with it, and had no further interest.

Q. You knew that the automobiles which were given to you as security had been up to that time the property of the corporation?

A. Yes, they had up to that time been the property of the corporation.

Cross-examination by Mr. SMITH.

Q. How long have you known Mr. McRell?

A. I met Mr. McRell when I went into the business about November, 1917-1916. [267-192]

Q. At that time he was a salesman, or connected in some way with the business?

A. Yes, he was the territory man.

Q. Did you ever talk with him about your dissolution with Mr. Boss? A. No, sir.

Q. Was he present at the depot when you were talking to Mr. Boss? A. No, sir.

(Testimony of E. W. A. Peake.)

Q. He wasn't there at all?

A. No, sir. He was at the depot, but not with Mr. Boss and I when we made our arrangements.

Q. How far was he from you?

A. Well, he wasn't within fifty feet.

Q. Not within fifty feet?      A. No.

Q. That is when you had this McCornack conversation?

A. No. When Mr. McCornack was there, he was with us.

Q. That is what I am referring to; when Mr. McCornack was there, Mr. McRell was with you, wasn't he?      A. Yes.

Q. Did you have any talk that day in Mr. McRell's presence about distribution and dissolution, or cessation of business?      A. No, sir.

Q. Nothing there said?      A. No, sir.

Q. When was it you had talk with Mr. Boss about dissolution and distribution?

Mr. REILLY.—This question is obviously designed to trap the witness, and it is an unfair question. The witness has testified to the conversation that occurred down there. The question asked him now puts a version upon it which, if the witness answers either Yes or No, whichever way it is, or [268—193] anything practically, he is committed to something which in fairness he should not be required to answer.

Mr. SMITH.—I will withdraw the form of the question, and use whatever form you say.

(Testimony of E. W. A. Peake.)

Mr. REILLY.—I think you know how to do it, without any trouble whatever.

Q. Did you have any talk with Mr. Boss about your getting out of the corporation?

A. Why, yes, away back in March.

Q. Did you have any other conversation with him between March of 1917 and June 1, 1917, about your getting out of the corporation?

A. Nothing to amount to anything, only asking when he would be able to be in a position to buy.

Q. You asked him when he would be in a position to buy? A. Yes.

Q. Did he tell you the condition of his finances?

A. Possibly. I don't particularly remember.

Q. During that time, between March, 1917, and June 1, 1917, you had full access to the books of your own corporation, didn't you? A. Yes.

Q. Have any trial balances?

A. Yes, Mr. Murphy got out a trial balance.

Q. How many trial balances did you have?

A. I do not know.

Q. Several, didn't you?

A. I wouldn't even say that, I think there were several.

Q. Several? A. Yes.

Q. How frequently did Mr. Murphy give you trial balances? [269—194]

A. That I couldn't tell you.

Q. When he got out those trial balances, didn't he give a copy to you for your desk, and one to Mr. Boss for him, for his information? A. No, sir.

(Testimony of E. W. A. Peake.)

Q. Did he make just one trial balance?

A. That is my memory, that there was only one.

Q. Did he give it to you or Mr. Boss, or keep it in his own possession?

A. I looked over it, and then we could either of us refer to it, as we wished.

Q. After you and Mr. Boss looked over it, did you discuss its contents to see how the business was getting on, see how things were going?

A. I don't remember any special discussion on it.

Q. Did you talk with Mr. Boss about how affairs were getting on?

A. We were always well satisfied as to the money-making part of the business.

Q. Both you and Mr. Boss were well posted as to the condition of the business?

A. Fairly well posted, I think.

Q. You knew the latter part of May, 1917, you knew about what you had made, didn't you? You knew the profits?

A. In a general way.

Q. What were they?

A. Well, I know now. I didn't know at the time.

Q. Oh! You examined those trial balances, and you didn't know what profits you were making? Is that right?

A. Yes, because the trial balance had not been made out in June or May. [270—195]

Q. When was it made before that?

A. It might have been made in—I don't know; it wasn't made at the time I went out.

(Testimony of E. W. A. Peake.)

Q. Didn't you say a moment ago that you had several trial balances between March and June?

A. Between March and June?

Q. Yes. A. No; from the time I went in.

Q. From the time you went in? A. Yes.

Q. How many trial balances did you have from November, 1916, up to June 1, 1917?

A. I do not know.

Q. Did you have more than one?

A. I would fancy all I could remember would be two or three.

Q. Did you have one every month?

A. I do not think so.

Q. When will you say you got those two or three trial balances? A. I don't know.

Q. But you did have two or three?

A. Yes, there were two or three made out.

Q. How near to June 1, 1917, did you have a trial balance made?

A. That would be impossible for me to say. I don't know. Mr. Boss has the trial balances; he should produce them.

Q. Did you, in addition to the trial balances, have access to the books? A. Certainly.

Q. You knew about how the sales accounts were going? A. Yes.

Q. You knew about the amount of business you were doing? A. Yes.

Q. And you knew that in your books you had a separate record of each car that was sold, showing specifically the items of [271—196] expense, the

(Testimony of E. W. A. Pealke.)

first cost, to whom sold, the amount received, and the profit, didn't you?     A. Yes.

Q. So you knew about what the profits were?

A. In a very general way.

Q. Well, what were they? What was your knowledge?

A. My knowledge is not very definite. I had an idea what the business was doing. That was all.

Q. What was your idea when you sold out for \$25,000, as you say, on your stock—what was your idea of what the profits were?

A. My idea of my profit would be \$10,000.

Q. Where did you get that idea?

A. From the sale of my stock.

Q. And you figured that on to the par value of the stock in order to arrive at the \$25,000, didn't you?     A. Yes.

Q. That is how you got \$25,000, was that you said you had put in \$15,000 on the face value of the stock, and you added to that the \$10,000 profits, didn't you?     A. Yes.

Q. Now, then, at the time that you decided to sell out to Mr. Boss, was there any talk there about Boss forming a partnership with Mr. McRell?

A. At the time I sold to Mr. Boss?

Q. Yes, on June 1st?

A. He said Mr. McRell was going to put in money.

Q. He told you that?     A. Yes.

Q. When did he tell you that?



(Testimony of E. W. A. Peake.)

A. I don't remember.

Q. Was it before or after you got this twenty-six thousand [272—197] dollar check?

A. It would be between the 20th, the time I made the price to Mr. Boss, and the time I went out.

Q. Well anyway, then, you knew that he and Mr. McRell were going in together before you got your twenty-six thousand dollar check, didn't you?

A. I knew that Mr. McRell expected to put money into the business.

Q. Did you know he was going in with Mr. Boss as a partner? A. I did not.

Q. How does it come you made this \$9600 check, that is part of this exhibit attached to this deposit slip, that you made that to the C. L. Boss Automobile Company?

A. Well, that is one thing, that Mr. Boss could change the name of the company, or he could run as a partnership, or he could run it himself. It made no difference to me.

Q. But you said you sold your stock to Mr. Boss in the Boss & Peake Automobile Company?

A. Yes.

Q. And you knew that company had not been dissolved, didn't you? A. Yes.

Q. Then, why did you make this check to another concern?

A. Well, why couldn't he make it. I was indifferent who made the notes, as long as I had the security. I considered that the company was his,

(Testimony of E. W. A. Peake.)

as he had purchased all the stock and could do as he saw fit with the assets.

Q. You didn't care, then, to whom you made that check?

A. Not at all. If he had asked me to make it to Mr. McRell, I would have made it to him.

Q. You never had done business with the C. L. Boss Automobile [273—198] Company, had you?

A. No.

Q. Never heard of it before?

A. Never heard of it before.

Q. When was the first time you heard of C. L. Boss Automobile Company?

A. The first time I ever heard of it was when I asked him "Whom shall I make the check to?" He said "Make it to the C. L. Boss"—I had it "C. L. Boss"—he said "Make it Automobile Company." So I added "Automobile Company" to it here.

Q. What is the date of that check, please?

A. June 1st.

Q. 1917? A. 1917.

Q. When did you give Mr. Boss that check?

A. I gave it to him, I presume, on June 1st.

Q. What time of day?

A. I don't remember.

Q. Was it the morning or afternoon?

A. I do not know.

Q. Did you know what he was going to do with that check when you gave it to him?

A. Well, I supposed he would cash it.

(Testimony of E. W. A. Peake.)

Q. Did you go with him to the bank to see that he deposited that?

A. Well, if I was with him at the bank, it was not for any reason to see that he deposited it.

Q. Will you kindly answer the question: Did you go with him to the bank that morning?

A. Yes, I went with him to the bank.

Q. And you were there, standing by his side, when he made out that deposit slip there that you have in your hand, weren't you?

A. If I was, I certainly didn't see it.

Q. Will you kindly answer the question: Were you there by his side when he was making out that deposit slip? [274—199] A. Not by his side, no.

Q. How far away were you?

A. I don't know.

Q. You were there anyhow?

A. I was in the bank.

Q. What were you there for?

A. That is where we made our arrangements to go down there to settle up. I was to meet him there with my stock, and he was to have his check and other stuff there.

Q. You knew you had to loan him \$9600 to make up the sum you claimed he paid you?

A. Yes, sir.

Q. You did lend it to him?

A. Yes, I did lend it to him.

Q. You were there at the bank when he made out that deposit slip?

(Testimony of E. W. A. Peake.)

A. I don't know he made it out even in the bank. I presume he did. I have no recollection of it.

Q. Did you know where he was getting the rest of his money to pay you such a sum as \$26,137.15?

A. Well, I knew he was borrowing some money from Mr. Farrington. That was all.

Q. Did he tell you how much he borrowed from Mr. Farrington?

A. No, he didn't, because I didn't know.

Q. Did he tell you he was borrowing the entire balance from Mr. Farrington? A. No.

Q. You knew that he wasn't, didn't you?

A. I didn't know. He had several prospects of getting money. What developed and what didn't develop, I had no knowledge of.

Q. I will call your attention now to this deposit slip. I call your attention to this check dated June 1, 1917, No. 2595, by Boss & Peake Automobile Company in favor of C. L. Boss for [275—200] \$8537.15, and I will show you the deposit slip again. You were there in the bank when Mr. Boss made the deposit, weren't you?

A. I cannot say that. I wasn't near Mr. Boss when I made the deposit, and neither did I see his deposit slip.

Q. You went with him to the bank that morning to close it up all at once, didn't you? A. Yes.

Q. You knew he had taken that check from Boss & Peake Automobile Company, didn't you?

A. I didn't know anything about his deposit whatever.

(Testimony of E. W. A. Peake.)

Q. You didn't care how he got the \$26,137.15 that you got?

A. No, it didn't make any difference to me.

Q. Weren't you there, Mr. Peake, to see that Mr. Boss made this deposit as per that slip and those three items before you accepted his check, which I now show you, dated June 1, 1917, on the First National Bank for \$26.137.15, signed Charles L. Boss? A. No, I wasn't there for that purpose.

Q. Didn't you see that he had that amount on deposit before you took this check?

A. I did not.

Q. Did you take a check of this size from him without knowing whether he had the money in the bank? A. I did.

Q. Yet you loaned him \$9600 of this sum yourself to pay yourself with? A. Yes.

Q. Now, on that same day, Mr. Peake, you took eight notes on the form of this yellow note?

Mr. MAGUIRE.—No—just a moment. Don't mislead the [276—201] witness. There are two forms. There were only eight notes given. Part of them were green ones.

Q. Did you take eight notes of this character?

A. This or similar character.

Q. Did you also take eight other documents of this character, of the one in blue, as part of the same transaction?

A. I don't know. I took notes to the value of \$9600.

Q. What was that for? A. These notes?

(Testimony of E. W. A. Peake.)

Q. Yes.

A. Mr. Boss' notes for the check I was giving him.

Q. Giving to Boss?      A. Yes.

Q. You also got the money back on that, didn't you?      A. Certainly.

Q. You gave him \$9600 on your check, and you immediately pulled it out on this \$26,000 check, didn't you?

A. Well, I don't know. I cashed my check.

Q. Yes.

A. Deposited my check. I didn't cash my check there, or certify it. I went over and put it through the bank in the ordinary course of business.

Q. You turned up with the \$26,000 plus the eight notes of \$1200 each, didn't you?      A. No.

Q. What did you do with those eight notes of \$1200 each?

A. All I got was \$26,000, of which I loaned him the \$9,000.

Q. Didn't you have these notes in addition that day—these eight notes of \$1200 each?

A. Well, I had put up my check for them.

Q. That is what I am getting at. You got the \$26,000 itself, didn't you? [277—202]      A. Yes.

Q. And you also had the eight notes of \$1200 each?      A. For which I paid \$9600.

Q. Well, we will see.

COURT.—Did you have those notes as security, or in what capacity?



(Testimony of E. W. A. Peake.)

A. I had these notes, Mr. Boss' notes, with automobiles as security.

COURT.—You didn't buy those automobiles outright?

A. No, I had nothing to do with the automobiles. These notes were prepared by Mr. Murphy and sent down to Mr. Boss, in order that he could raise this that I was loaning him, \$9600. As to the form of the notes or anything like that, I had nothing to do. Mr. Murphy prepared them in regular course of business, for \$9600, and I gave him a check for \$9600.

Q. Each of these eight notes of \$1200 was afterwards paid in full to you, wasn't it? A. Yes.

Q. So that you got the \$9600 that they represented, didn't you? A. Yes.

Q. Then you got the \$26,000 on the check, didn't you? A. Yes.

Q. And the \$9600 on the notes?

A. Which I had paid.

Q. You loaned him—

A. Which I had money loaned, yes.

COURT.—What became of the automobiles?

A. I don't know. The notes were paid. What he did with the automobiles, I don't know.

COURT.—Were they turned back to him?

A. They were turned back to him, yes.

Q. Anyway, you got your money out of them?

A. Yes. I suppose he sold them in the ordinary course of [278—203] business.

Q. Suppose, then, Mr. Peake, that instead of

(Testimony of E. W. A. Peake.)

loaning Mr. Boss the \$9600, you had simply taken a check for \$16,537.15?

Mr. REILLY.—That is the twenty-six thousand less \$9600?

Mr. SMITH.—Yes, that is the twenty-six thousand less the \$9600.

Q. And the automobiles themselves, you would have had the exact amount, wouldn't you?

A. Yes; but I didn't do that.

Q. Now, I notice this check from Mr. Boss to you is signed by himself individually—the twenty-six thousand dollar check? A. Yes.

Q. It didn't run through the corporation?

A. No, that didn't go through the corporation.

COURT.—What is that—the \$9600?

Mr. REILLY.—The twenty-six thousand dollar payment for the stock, your Honor.

COURT.—Did you bank at the same bank you went to that morning?

A. No. I banked, I think it was at the Lumbermen's or the U. S.

COURT.—You took this check from there, and went over and put it in your own bank?

A. Yes, sir.

Q. You didn't do that until after you saw that this deposit was made by Boss in the First National Bank?

A. Oh, I didn't see that deposit slip.

Q. Well, excuse me. I don't mean that you actually saw the deposit slip, but you didn't take

(Testimony of E. W. A. Peake.)

that check over to your bank until you knew that Boss had made this deposit in that bank.

A. I knew Mr. Boss wouldn't make a check that wasn't good. [279—204]

Q. Answer my question. On that morning, weren't you careful enough to see that Boss made a deposit in the bank before you took that check over to your bank?

A. No, I didn't pay any attention to that at all.

Q. Yet you went to the First National Bank with him that morning?

A. Yes, we met there to close up the deal.

COURT.—Was it there you signed?

A. That was where I was to bring my stock, and Mr. Boss was to bring his settlement.

COURT.—Was that where you assigned the stock?

A. It was where I indorsed the stock over to Mr. Boss.

Q. And wasn't it there, and at the same time, that you yourself issued this check for \$9600 in favor of C. L. Boss Automobile Company, on the First National Bank of Portland, Oregon?

A. Well, I made this check out, and I made it out to C. L. Boss. Then he said to add "Automobile Company," and I added "Automobile Company" on it.

Q. Mr. Peake, you say that you cleared this check of Boss' through your bank?

A. I cleared through my bank. I forget which bank account I used at the time.

(Testimony of E. W. A. Peake.)

Q. Will you show me any indorsement or anything of the kind to indicate that?

A. Well, I just deposited it in the regular way.

Q. Deposited it where?

A. I don't know where it was deposited. I know I got the money.

COURT.—Have you got your bank-book?

A. I haven't got my bank-book. I could get it, I presume.

Q. Didn't you state a moment ago that you sent it through your own bank—the Lumbermen's?  
[280—205]

A. I am not sure. I had two or three accounts, and I am not sure which account I sent it through.

Q. There is nothing there to indicate you sent that through the Lumbermen's Bank, is there?

A. That is a matter of memory. I know I got the money on this check, and I thought I had deposited it in the regular way. I may have had an account in the First National Bank at that time. I don't know.

Q. What is your recollection now since you have seen the condition of that check?

A. I don't remember. I wouldn't say where I deposited the check. I know I got the money.

Q. You are an experienced financial man?

A. Oh, somewhat.

Q. You have handled finances a number of years?

A. Yes.

Q. Done a lot of banking business?      A. Yes.

Q. From the indorsements that you see on the

(Testimony of E. W. A. Peake.)

check you have in your hand, the twenty-six thousand dollar check, and its condition now, isn't it your conclusion that you deposited that right in the First National Bank itself?

A. Well, if I had my account at the First National Bank, I certainly deposited it there, but I don't remember.

Q. Did you put it on deposit or pull down the cash?

A. Well, I know I didn't take the cash. My memory would be that I had put it on deposit.

Q. Then you are mistaken in saying you cleared it through the Lumbermen's?

A. I didn't say positively. Wherever my account was, I put it there. I don't know which account it was. I have had accounts in all of them. [281—206]

Mr. REILLY.—We have sent for the witness' bank-book, your Honor.

COURT.—Very well.

Q. When was it you gave the stock over to Mr. Boss?

A. I gave it to him at the time he gave me the check.

Q. At the same place? A. Yes.

Q. In the First National Bank of Portland?

A. Yes.

Q. When was your resignation as an officer of the Boss & Peake Automobile Company written out, do you know?

(Testimony of E. W. A. Peake.)

A. Well, my impression is that it was made and given to him at the same time he got the stock.

Q. I will show you now this document—the pages are unnumbered—it is in the record book of the Boss & Peake Automobile Company; purports to be.

Mr. REILLY.—It is part of the sheets introduced in evidence.

Mr. SMITH.—All right.

Q. Purporting to be your resignation. Is that right? A. Yes.

Q. What is the date of it, please?

A. May 31st.

Q. May 31 is written in typewriting above, isn't it? A. Yes.

Q. It is also written in pen down here at the bottom, where the blank was left to fill in the correct date with the pen, wasn't it? A. Yes.

COURT.—Both those dates are May 31st, are they?

Mr. SMITH.—Yes, your Honor; typewritten one at the top, and one at the bottom is May 31st also.

COURT.—That was prior to this transaction at the bank?

Mr. SMITH.—The day before.

A. Well, I prepared my resignation that day, and delivered it [282—207] to Mr. Boss at the bank.

Q. I will show you now Peake's Exhibit "H," being stock certificate No. 2 of the Boss & Peake Automobile Company, for 149 shares. That was your certificate, wasn't it?



(Testimony of E. W. A. Peake.)

A. Yes, that was mine.

Q. Who was W. H. Bietau?

A. She was my secretary.

Q. I will show you now certificate No. 4 of the Boss & Peake Automobile Company for one share of stock in favor of W. H. Bietau, and ask you if that is one of the certificates you turned over, as you say?

A. Yes, I think that was the certificate I turned over.

Q. Now, I will again show you these separately, first showing you your own certificate of stock, and ask you to look at the back, the indorsement—the transfer. Those blanks are filled in in your own handwriting, aren't they? A. C. L. Boss?

Q. Yes. A. No, sir.

Q. Well, anyway, your signature is at the bottom, isn't it?

A. Wait a moment. Let's see which one this is.

Q. That is yours, Mr. Peake.

A. Yes, this is my signature.

Q. And what date does that bear, please?

A. May 31st.

Q. That is the day before you got this check?

A. Yes.

Q. I also show you certificate of stock from W. H. Bietau indorsed to Mr. McRell, and ask you what date that is made? A. May 31st.

Q. Now, then, can you tell us when and where you turned these certificates of stock over to Mr. Boss?

(Testimony of E. W. A. Peake.)

A. Well, it was down at the bank, when I got my check.

Q. You still cannot tell what time of day that was, whether in [283—208] the morning or the afternoon.

A. No, I couldn't say. My impression is it was the morning, but I am not sure.

Q. How does it happen you were dating these instruments on the 31st of May, if you didn't know anything about the change in business that was to take place on the first?

A. Well, I had all my stuff prepared ready for the day, on the 31st.

Q. That is what I want to know: Why did you prepare them in advance? A. Why did I?

Q. Yes. A. So as to have them ready.

Q. What talk did you have with Mr. Boss, if any, that led you to prepare these documents in advance?

A. Well, he was going to bring his stuff down, I had to have mine, the next day. That is all. We would both be ready for settlement.

Q. You had a talk with him on May 31st, then, did you? A. We made an appointment.

Q. Did you actually indorse these on May 31st, the day they are written there?

A. Well, I cannot remember that. They are dated that day, but I can't say whether.

Q. Did you actually have your resignation signed on May 31st?

A. I had all those things ready on May 31st.

(Testimony of E. W. A. Pealke.)

Q. Why did you prepare them May 31st? Why did you resign on May 31st unless you knew there was to be a change in business the next day?

A. Because I was severing my connection with the company that day.

Q. On May 31st? A. Yes. [284—209]

Q. Had you gone over the condition of the business on May 31st, before you filled out these blanks?

A. No, sir.

Q. Had you confirmed your opinion about your half of the profits being \$10,000?

A. No, sir.

Q. When did you form that opinion, that your half of the profits was \$10,000?

A. Well, I just made a lump sum guess at what I would take to go out.

Q. About when did you form that opinion?

A. I formed it very suddenly when I saw the atmosphere that was created down at the station.

Q. That was on May 21st, wasn't it?

A. That was on May 21st.

Q. You formed it right there? A. Absolutely.

Q. And when did you decide definitely that your share of the profits was \$10,000?

A. Right there.

Mr. REILLY.—He hasn't said.

A. What is that?

Mr. REILLY.—This is an attempt by means of phraseology to put—

A. I made up my mind to sell out for \$25,000 then and there.

(Testimony of E. W. A. Peake.)

Q. At that time you had in mind the condition of the business, didn't you?

A. I had a general knowledge of the business, yes.

Q. What else did you take into consideration in fixing the value of your stock, other than its original capital value and the \$10,000 dividends? [285—210]

A. Well, it was a pretty good business, making about \$5,000 a month.

Q. How much?

A. About \$5,000 a month at that time; between \$4,000 and \$5,000.

Q. And you charged nothing for that?

A. I didn't get very much for it, no.

Q. And the items, as I understand, that made up this \$25,000 were the original value of your stock \$15,000, plus the \$10,000 profit?

A. No; I just made an offer to Mr. Boss to sell at \$25,000.

Q. You fixed that sum as heretofore testified?

A. I fixed that sum at the Union Station.

Q. Now, at the time you sold to Mr. Boss, as you say, what conversation, if any, did you have about the dissolution of the Boss & Peake Automobile Company? A. None whatever.

Q. Had you had any before that time about its dissolution? A. None whatever.

Q. Never was discussed with you at all?

A. No, sir.

Q. Although it had your name?

A. Beg pardon?

(Testimony of E. W. A. Peake.)

Q. Although the Boss & Peake Automobile Company had your name in it? A. Yes.

Q. I want to recur again to this check of \$9600 to the C. L. Boss Automobile Company, and I call your attention to the fact that the edges of it are smooth, that it has no place for a number on it, and it is apparently just a blank form of counter check, isn't it? A. This is a counter check, yes.

Q. Where did you write that check?

A. First National Bank. [286—211]

Q. Down there in the bank itself? A. Yes.

Q. At the same time that Mr. Boss was there with you?

A. At the same time that he delivered the \$9600 security—security for \$9600.

Q. At the time he was there to make the deposit in order to pay you?

A. Yes, I presume so. I don't know whether he made the deposit then.

Q. In whose handwriting is the body of this yellow note here, dated June 1, 1917?

A. That is Mr. Murphy's, I think.

Q. In whose handwriting is the body of that blue note? A. That, I believe, is in Mr. Murphy's.

Q. Do you know when those notes were made out? A. They are marked June 1st.

Q. No, no; I am asking you, please, if you know when these were made out? Were they made out that morning, or the day before?

A. I do not know.

Q. You don't remember that? A. No.

(Testimony of E. W. A. Peake.)

Q. Did Mr. Murphy make them out at your request or Mr. Boss'?

A. He made them out at, I presume, Mr. Boss' request.

Q. Did you have anything to do with the making of those notes?

A. No, I had nothing to do with the making of those notes.

Q. Were you present when the notes were made?

A. No, sir.

Q. When did they first come into your possession?

A. They came into my possession, as I remember, at the bank.

Q. How did you have them there at that time?

A. Well, I presume they were delivered to me by Mr. Boss.

Q. Before these notes came into your possession, was there any [287—212] discussion between you and Mr. Boss about your taking the eight automobiles themselves? . A. Why, no.

Q. Wasn't there on that 31st of May a discussion between you and him on that?

A. I have no recollection of any discussion, only as taking those as security\* for his note.

Q. Then, you have no recollection of any discussion between you and Boss about your taking the eight automobiles themselves—eight Hudson Super Sixes?

A. Not taking the cars themselves, no.

Mr. REILLY.—If the Court please, this theory



(Testimony of E. W. A. Peake.)

that has been injected into the case is utterly at variance with the theory of the cross-complaint and the theory of the answer. If they are going to start a new theory, I think they ought to amend their pleadings, so we can make them stay put some place. We are entitled to have them on some definite ground, one ground or the other. Counsel is branching out into an absolutely theory—that instead of getting \$26,000 in cash, Mr. Peake got some money and some automobiles. It is absolutely opposed to his cross-complaint, and it is opposed to his answer to the Government's bill. In that situation, I think this theory should not be permitted to be pushed unless they want to amend their pleadings. They have got to take a stand somewhere.

Mr. SMITH.—We don't care to amend the pleadings, if the Court please. What I am showing to the Court is, that in a court of conscience, a court of equity, it is immaterial what form a transaction takes, that the Court looks right through it and sees what was done in effect; and if this evidence shows, which it does conclusively, in my judgment, that the effect of [288—213] this whole transaction was that he pulled down \$8537.15 of his own corporation's cash, and he also took eight of those automobiles from the stock in trade, in effect; whether as a fact or not, the effect of it is that; and he also took an \$8,000 borrowed money from Mr. Boss; and also took down his salary,—that he has depleted the assets of that corporation, and he

(Testimony of E. W. A. Peake.)

did it knowingly, on that first day of June, 1917. This is a tax that follows the profits. He got the profit in fixing the face amount that he says he charged for his stock, and in taking payment for that profit, he depleted the assets of that corporation; therefore the tax follows him. I don't care what form it took—whether it took the form of transfer of stock or transfer of the automobiles, or borrowed money, or what—there is nothing in conflict with it at all.

COURT.—It is very apparent here so far, by the one witness that has had anything to say about it, that those automobiles were taken as security, and not as part payment.

Mr. REILLY.—That is true, your Honor. The only point is, this inquiry is rambling along taking time entirely outside of the theory they make themselves.

Q. You made this loan to C. L. Boss individually, didn't you, this \$9600 loan that you claim to have made to C. L. Boss?

A. What are the notes signed—C. L. Boss or C. L. Boss Company—I forget which.

Q. Did you take a note from Mr. Boss for the \$9600?

A. I took notes from him, C. L. Boss or C. L. Boss Automobile Company, for them.

Q. Will you kindly answer my question: Did you take one note of \$9600?

A. No, not to my recollection; not one note. It

(Testimony of E. W. A. Peake.)

was eight [289—214] notes, was it not, for \$1200 each?

Q. The only notes that you took were the eight notes of \$1200 each?

A. Yes, that is my recollection.

Q. And those are these conditional sales forms that you have for the sale of an automobile?

Mr. REILLY.—They are not that now. One is a straight note, collateral note.

Mr. SMITH.—All right, let's see:

“\$1200.00                      Portland, Oregon, June 1, 1917.

For value received, I or we promise to pay to E. W. A. Peake or order Twelve hundred & no/100 dollars, in gold coin of the United States of America, with interest thereon in like gold coin at the rate of 8 per cent per annum from date until paid, payable in one installment of not less than \$1200.00 in any one payment, together with the full amount of interest due on this note at time of payment of each installment. The first payment to be made on demand (the rest scratched out) thereafter, until the whole sum, principal and interest, has been paid; if any of said installments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder hereof. And in case suit or action is instituted to collect this note, or any portion thereof, I or we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action, and I or we expressly waive the provisions

(Testimony of E. W. A. Peake.)

of and all benefit and advantage from any and all appraisement, homestead, stay and exemption laws now existing or hereafter made. [290—215]

This contract is given upon and for the sole consideration that E. W. A. Peake, hereinafter referred to as the second party, has agreed that upon the payment of the sum above mentioned, as above set forth, time being the essence hereof, the second party will sell, transfer and deliver unto the undersigned, the following described personal property, to wit:

One 1917 Hudson Super Six Automobile, Factory # J 253, Motor 30928, which said property has been entrusted to the care of the undersigned. It is expressly agreed that said property so entrusted is the property of the second party, and shall remain so until the second party shall make the aforesaid sale and transfer, after all payments shall have been made, as above provided. The undersigned hereby agrees to keep said property in good repair and condition, and to take the best care of the same, keeping it insured against loss by fire, theft and collision, in favor of the said second party, or . . . assigns in such company as may be designated by said second party in a sum sufficient to cover . . . or their interests therein at all times."

COURT.—Who repaid the money to you that you loaned to C. L. Boss Company?

A. Well, the check was usually brought in by Mr. Murphy.

(Testimony of E. W. A. Peake.)

COURT.—How is that?

A. Mr. Murphy, their bookkeeper, used to bring the checks in for it.

COURT.—Brought in checks to you in payment of that? A. Yes.

COURT.—Whose checks? [291—216]

A. C. L. Boss Automobile Company, I believe.

COURT.—It was a check of the C. L. Boss Automobile Company that repaid you the \$9600?

A. That he repaid me the \$9600.

COURT.—What became of these contracts when you got your money?

A. I turned them over to Mr. Murphy for C. L. Boss.

Mr. SMITH.—(Continuing reading:) “It is understood and agreed that the undersigned shall not sell, transfer, or otherwise dispose of said property nor remove same from the State of Oregon, without the written consent of second party. In case of default in the payment of any amount due as above provided, or in case the undersigned shall part with the possession of said personal property, or if same be removed from the State of Oregon without the consent of the second party, or whenever second party or the holder of this note deems the debt hereby evidenced insecure or if said property be secreted or seized by process of law, or attempted to be sold, encumbered or otherwise disposed of or abused or misused, the second party or . . . assigns shall have the right, at any time, without notice or remand, take, reclaim, re-



(Testimony of E. W. A. Peake.)

move, hold and sell said property at public or private sale, without notice, at any place, and credit the proceeds thereof, less expenses of taking, removing, holding and selling the property, including attorney's fees upon this note, or without sale indorse the true value of said property, less said expenses of taking, removing and holding the same and attorney's fees upon this note; and I agree to immediately pay any balance then remaining unpaid on this note, in consideration of the use, rental and [292—217] depreciation of said property. Suing upon this note or taking judgment thereon shall not until the suit or judgment is paid in full in cash, divest said company of title to said property, or prevent its reclaiming, selling and applying the proceeds or value thereof as aforesaid, or vest title to said property in said vendee; nor shall any delay in retaking said property, or in enforcing said note, or allowing said property to remain in the possession of the vendee after default, or the acceptance of any payment after default, be deemed to waive any right of said second party or . . . assigns to reclaim said property."

That is signed "C. L. Boss Automobile Co. By C. L. Boss."

Mr. REILLY.—You don't claim that that is not a usual form used in loaning money?

Mr. SMITH.—That I am not saying. I don't think it is myself.

Q. Do you know where this 1917 Hudson Super



(Testimony of E. W. A. Peake.)

Six car referred to in that was at that time, Mr. Peake?

A. No, no more than it was either with Mr. Boss or in the warehouse. I don't know which.

Q. Was it on the floor of the Boss & Peake Automobile Company, in your place of business, or was it down at the warehouse?

A. I don't remember.

Q. Now, isn't it a fact that it was at the warehouse, and that that is the reason you took the blue one?

Mr. LOGAN.—Oh, no, this one was at the store and the blue one was at the warehouse.

A. As I say, Mr. Murphy selected those forms and made out the notes, and I have no definite recollection where they were.

Q. Now, then, do you know how many of those eight notes were on the blue form and how many on the yellow form?

Mr. REILLY.—Find out what the blue form was. [293—218]

A. No, I don't remember.

Q. Weren't those represented by the blue form at the warehouse, with warehouse receipts attached, and the ones represented by the yellow form in the actual possession of the Boss & Peake Automobile Company at your place of business?

A. Very likely, yes.

Q. You admit that fact, don't you?

A. I say, it is very likely. I don't know whether they were or not.

(Testimony of E. W. A. Peake.)

Mr. SMITH.—Now, the blue form reads:

Mr. REILLY.—You don't need to read the comment about it. Point out the collateral security.

Mr. SMITH.—(Reading:) “And as collateral security for the payment of this note and for any other indebtedness which is now, or may hereafter be due by this corporation to said bank, this corporation herewith deposits the following personal property, to wit:” And in the handwriting of some one: “Occidental Warehouse & Transfer Co. Warehouse receipt covering 1917 Hudson Super Six Factory # H-20305, and this corporation hereby gives to the holder of this note complete authority to sell said collateral, or any part thereof, or any that may be received in exchange thereof, or in addition thereto.”

Mr. REILLY.—That is enough to show our purpose. If you want to read on, it is all right.

COURT.—I shall probably look at those things myself.

Mr. SMITH.—All right.

Q. You say that you don't remember the time of day you went to the bank?

A. Not definitely, no. [294—219]

Q. After you went to the bank, did you return to your place of business or not?

A. I certainly did some time, but when, I don't know.

Q. I mean, did you return that same day?

A. Yes.

(Testimony of E. W. A. Peake.)

Q. Did you transact any business there in the name of the corporation?

A. Not to the best of my knowledge. I do not know.

Q. I want to show you a photostatic copy, picture copy of a check dated Portland, Oregon, June 1, 1917, No. 2588, signed "Boss & Peake Automobile Co. By"—whose signature evidently appears on the check? A. That is my signature.

Q. You wrote that check, did you?

A. No, Mr. Murphy wrote it.

Q. I mean, that you issued it? You signed it as an officer of the company?

A. Mr. Murphy prepared this check, and gave it to me to sign. I didn't pay any especial attention to the check.

COURT.—What is the check?

Mr. SMITH.—Check of \$10.50 in favor of J. C. Corbin Co., dated June 1, 1917.

Q. Do you remember whether you wrote that check before you went to the bank with Mr. Boss, or not?

Mr. REILLY.—He says he didn't write the check.

Q. Well, sign it?

A. That check must have been written before I went out of the business.

Q. Upon what do you base that conclusion?

A. Well, I never signed anything after that.

Q. Have you any record in your possession

(Testimony of E. W. A. Peake.)

showing the time at [295—220] which these \$1200 notes were paid?

A. I presume I have that, yes.

Q. Have you a recollection, independent of the record, of approximately the time?

A. I know they were paid up very rapidly. I don't know how long, but they were paid very quickly.

Q. Anyway, they were paid separately later on, weren't they?

A. Yes, they were paid separately.

COURT.—Just let me ask: Was the process to release one of those obligations as you received payment on your note?

A. Yes, each one was separate, and as each note was paid I delivered the security.

COURT.—You released the security?

A. Yes.

COURT.—To whom did you release the security?

A. Mr. Murphy always came and got them, as bookkeeper for the C. L. Boss Automobile Company.

Mr. REILLY.—Does that answer your Honor's question? The witness evidently doesn't understand. The witness says Mr. Murphy. Does your Honor get a complete answer to your question?

COURT.—He said he was the bookkeeper.

Mr. REILLY.—For C. L. Boss Automobile Company?

A. For C. L. Boss Automobile Company, yes.

Mr. LOGAN.—He had been bookkeeper for Boss & Peake Automobile Company.

Recess until 2 P. M. [296—221]

Portland, Oregon, May 24, 1922, 2 P. M.

Mr. REILLY.—There is an explanation that I desire Mr. Peake to make. This morning when your Honor was asking him about what he did with the twenty-six thousand dollar check, he was under the impression that he had put it into the account which he had in the Lumbermen's National Bank. He had several accounts, and he has now his deposit-book in the First National Bank, which shows that deposit made on the first day of June. He was prepared immediately upon going to the stand to explain to your Honor that he was mistaken in thinking it was in the other account.

COURT.—You have that book here?

Mr. REILLY.—I have that book here, and will put it in evidence if your Honor desires.

COURT.—You might put it in evidence now, then.

(Deposit-book of the First National Bank of E. W. A. Peake, showing a deposit on June 1, 1917, of \$26,137.15, received in evidence and marked Peake's Exhibit "K.")

Mr. SMITH.—There were produced yesterday on request of counsel two sheets which they say were not the sheets they desired. I would like to take them with me.

Mr. MAGUIRE.—Yes, let me make a memorandum. [297—222]

(Testimony of E. W. A. Peake.)

Mr. SMITH.—The clerk has called my attention to the fact that these pages 159, 159-a and 159-b of this journal have not been separately marked. They have been referred to frequently in evidence.

COURT.—Very well. Let them be marked.

(Marked Boss' Exhibit "H.")

(Black Account-Book, Boss' Exhibit "I.")

(Combined Cash and Journal, Boss' Ex. "J.")

With the consent of counsel for all parties, the hearing in this case was continued to a date to be hereafter set. [298—223]

Portland, Oregon, July 7, 1922, 10 A. M.

E. W. A. PEAKE resumes the stand.

Cross-examination (Continued).

(Questions by Mr. SMITH.)

Did you know, or were you acquainted with any of the Government representatives who were experting the books or arriving at the amount of income tax down there?

A. Not that I know of, no.

Q. Did you know a Mr. Barber? A. Yes.

Q. Did he work with this gentleman?

A. I don't think he did, on that job.

Q. Didn't Mr. Barber work there at your place of business in estimating this tax? A. No, sir.

Q. Did you ever talk with Mr. Barber about it?

A. Yes, I told him about it.

Q. Then, how many times did you talk to Barber about the tax?

A. Oh, I don't know. He was doing some work



(Testimony of E. W. A. Peake.)

for the Twin States Motor Car Co., and he spoke of it—he came up to ask about that.

Q. Those talks that you had with Mr. Barber were long before you got this written notice from Mr. Boss, weren't they? A. Oh, no.

Q. When were they? A. After that.

Q. Do you say this written notice from Mr. Boss was the first time you ever heard of the levy of the income tax question?

A. Yes. That was the first, yes. [299—224]

Redirect Examination.

(Questions by Mr. REILLY.)

Mr. Peake, mention has been made of a check—I believe it was offered in evidence—ten dollars or some such small amount, dated June 1, with your signature on it. What was your practice there, before you left the corporation, with respect to signing checks in blank, if you did?

Mr. SMITH.—Objected to as incompetent. We asked him a specific question to show that he was there on June 1st, and that he transacted that piece of business, that he made that one check himself.

Mr. REILLY.—That is exactly the reason I am asking the question, to show he left there before June 1st, and the corporation people filled it in afterwards. He was not there transacting business on June 1st.

(Objection overruled.)

A. Mr. Murphy used to occasionally write a lot of checks and fill in the amounts, and sometimes

(Testimony of E. W. A. Peake.)

possibly they were not dated until the check was distributed or sent, and the party was held up.

Q. Did you transact any business of the Boss & Peake Automobile Company on June 1st?

A. None whatever, no.

Q. Have you been connected with the automobile business for a considerable time, Mr. Peake, in one way or another? A. Yes.

Q. How long?

A. Well, it must be eight or ten years.

Q. And are you familiar in a general way with the value of these various automobile agencies?

A. Yes, I have an idea. [300—225]

Q. Do you know what the value of the agency is held by the Boss & Peake Automobile Company on May 31, 1917, what that value was, the goodwill of the business?

A. Why, I think, at the rate they were making money at that time, and with the small capital, it was conservatively worth \$50,000.

Excused. [301—226]

### **Testimony of R. E. Murphy, for Defendant.**

R. E. MURPHY, called as a witness on behalf of defendant Peake, being first duly sworn, testified as follows:

#### **Direct Examination.**

(Questions by Mr. MAGUIRE.)

Your name is R. E. Murphy?

A. R. E. Murphy.

(Testimony of R. E. Murphy.)

Q. Were you ever employed by the Boss & Peake Automobile Company? A. Yes.

Q. In what capacity, Mr. Murphy?

A. Bookkeeper and general accountant.

Q. For what period of time were you employed by that corporation?

A. During the whole existence of the corporation.

Q. Have you been employed by the partnership which preceded the formation of the corporation?

A. Yes.

Q. And in the same capacity? A. Yes.

Q. And did you continue keeping the books of the business subsequent to the time that Mr. Peake sold out? A. Yes.

Q. And were all of the books under your own personal charge and supervision? A. Yes.

Q. Now, Mr. Murphy, I want to call your attention to what has been designated here as the Journal of the C. L. Boss Automobile [302—227] Company, and particularly to pages 159-a and 159-b. I note that that page appears at the end of the business for the month of May, 1917, and page 160 bears the heading of June, 1917. I want to ask you whether or not page 159-a and 159-b were made prior to the entries appearing on page 160? A. No, they were not.

Q. Will you state to the Court when those entries were, in fact, made?

A. Well, it is hard to tell exactly, but the fact that it numbers continuously 159, 160, etc., means

(Testimony of R. E. Murphy.)

that at some future date, when I was able to bring the work up to date, I put it in the part of the journal it belonged to, designating it 159-a, so that the consecutive numbers had been used, and this sheet was worked up at a later date.

Q. I want to call your attention to the entries on page 164 of this journal, and particularly to the entry "Capital A/c B. & P. A. Co., \$15,000," credit to "C. L. Boss, personal, \$15,000," and "Capital account," and state, if you can, approximately when those entries were made, if you can tell by the previous date in the book.

A. Well, it is very evident that they were after June 15th, and I should say that there is enough intervening work here to make it several days after June 15th.

Q. Now, bearing particularly attention to this entry here that I have just called your attention to on page 164, and to the entries which appear upon page 159-a, can you from those entries give any approximate date when the entries on 159-a were, in fact, made?

A. Yes, I should say that they were all part of the one transaction, that this work was brought at this time, at the same [303—228] time that this entry here was made.

Q. On 164?

A. Yes. I should say that page 164 was worked up at the same time that 159-a was.

Q. Now, will you state whether or not the journal is a book or original entry, in the sense that

(Testimony of R. E. Murphy.)

it was made at the time the transactions therein portrayed took place? A. Yes, in most cases.

Q. And where do you get the data for your journal entries?

A. Well, from very many different sources.

Q. Well, do they come from other books of entry? A. Some do, and some do not.

Q. Now, Mr. Murphy, I want to call your attention to the combined cash-book and journal for the month of June, being page 135, and to an entry appearing therein under date of June 19, 1917, and particularly to check 2804, \$4223.91, bearing the legend "Clearing account." Will you explain to the Court what that transaction was, and when it took place?

A. That was the date of the transfer, and represented the balance in the bank of the Boss & Peake Automobile Company, which at that date was being deposited to the C. L. Boss Automobile Company.

Q. The C. L. Boss Automobile Company was the partnership of Boss and McRell? A. Yes.

Q. Now, will you state whether or not prior to the 19th of June the funds of the business were deposited and kept in the Boss & Peake Automobile Company bank account?

A. Yes, up to June 19th.

Q. Now, turning back to page 118 of this cash-book, I note there a check numbered 2588 in amount of \$10.50, made payable [304—229] to J. C. Corbin Company, Maxwell insurance, various items.



(Testimony of R. E. Murphy.)

A. Yes.

Q. It has been testified, and the exhibit I believe is in evidence, that that check was signed by Mr. Peake. Do you know whether or not Mr. Peake transacted any business on behalf of the corporation on the first of June, 1917?

A. He didn't in that office. That is as much as I would know.

Mr. SMITH.—Just a moment.

A. The offices of the automobile house.

Q. Do you know how that check came to be signed by him, and what your practice was with regard to making out checks for general expense items, such as that?

A. It had been customary for Mr. Peake to leave one or two emergency checks as he would go out, and I would account to him when he came back as to what I had used the checks for. So that in that way this bill of Corbin's probably was presented one or two days before. It might have taken me that long to make the audit of the different items in order to pay it.

Mr. SMITH.—Just a moment, if the Court please. Have you any recollection of that being done in this instance? Have you any independent recollection of that being a fact in this transaction?

A. Not except that was the custom.

Mr. SMITH.—I move to strike the testimony, as being incompetent, irrelevant and immaterial.

COURT.—The testimony shows for itself, and



(Testimony of R. E. Murphy.)

the Court can apply it as may be proper. I will overrule the motion.

Q. Now, Mr. Murphy, was there any change at all made in the manner in which the business was carried on and the books [305—230] were kept, between the operations of the Boss & Peake Automobile Company and the C. L. Boss Automobile Company? A. No.

Q. Did you have any instructions to make any changes in the method of keeping books or the manner of transacting the business on June 1st, or immediately thereafter? A. No.

Q. Now, after Mr. Peake sold his stock in the Boss & Peake Automobile Company, did you have any conversation with Mr. Boss relative to your purchasing any stock in the corporation?

Mr. SMITH.—Just a moment. I don't want to object to counsel's asking questions his own way, but he based this upon transfer of stock. This witness doesn't know of the transaction. If that is meant just to identify the transaction, the question is not objectionable. He might have put in dates. You are speaking of it just to identify the transaction?

Mr. MAGUIRE.—I will use the words after June 1, 1917. I was trying to identify a date.

A. Yes.

Q. Will you state to the Court what that conversation was?

A. Mr. Boss wanted me to borrow \$3,000 from Mr. Peake to take some stock in the corporation.

(Testimony of R. E. Murphy.)

Q. And that was after Mr. Peake had retired from the business?

A. I believe it was the next day after.

Q. Now, Mr. Murphy, will you state whether or not there were any statements taken from the books of the Boss & Peake Automobile Company, during its corporate existence and prior to the time Mr. Peake retired from the company, showing the profits, the estimated profits of the business?

A. I don't recollect any. We took a monthly trial balance, [306—231] but of course that would not serve for that purpose.

Q. Why wouldn't a monthly trial balance show what the profits were?

Q. Well, that would require an inventory of all of the automobiles and used cars and parts and shop equipment, furniture and fixtures. It would take a period of about two weeks for an automobile house to do that.

Q. What is a trial balance for?

A. Merely a check on your postings, to verify that your entries are correct, for the period covered by the trial balance.

Q. In other words, just to see if your books balance?      A. Yes.

Q. I see. Now, then, Mr. Murphy, was any estimate taken off, or any statement taken off the books, any time from the 1st of May to the 1st of June, as to the status of the business?

A. None that I know of.

(Testimony of R. E. Murphy.)

Q. State whether or not your books were kept up to date? A. No, they were not.

Q. About how much were they behind at about that period?

A. Well, I couldn't say. I had more work than I could handle. Too much system was what the trouble was, and I couldn't keep it up. It was my own idea, and it didn't work out right.

Q. Did you have any conversation with Mr. Boss, after Mr. Peake had retired from the business, with regard to the purpose or idea which he had in mind in ordering so many Hudson cars?

A. Yes.

Q. What was that conversation?

A. Well, when Mr. Boss advised me that he bought Mr. Peake out, he called to my mind the number of different little troubles that they had had together, and the cars were coming faster [307—232] than they were needed, and at times I was able to get Mr. Peake to pay the drafts, even though it was in excess,—I could do that if Mr. Boss didn't interfere at the time, but if he did, then there was friction, and I was not able to influence Mr. Peake to take up the drafts. After the deal was finished, Mr. Boss said to me, he said, "You didn't know why I was doing these little things at the time, but you see I have his stock." That was the substance of it.

Q. I want to call your attention, Mr. Murphy, to two forms of note. They seem to be attached together, marked Boss' Exhibit "D." In whose

(Testimony of R. E. Murphy.)

handwriting are those notes, other than the signatures? A. They are in mine.

Q. Is the second note in yours also?

A. Yes.

COURT.—What are those notes?

Mr. MAGUIRE.—Two of the notes given on the eight Hudson cars taken as security.

Q. Now, do you know the history of those transactions? A. Yes, in a general way, I do.

Q. Where did you get your knowledge with regard to that?

A. Well, because it had been a custom in the business, and is yet, of borrowing money on cars in the warehouse.

Q. Those are the usual forms of notes when money is borrowed upon cars? A. Yes.

Q. Well, did Mr. Boss ever tell you that Mr. Peake had taken these cars over as his?

(Objected to as incompetent.)

Mr. MAGUIRE.—I think possibly that question is [308—233] objectionable. I will withdraw it.

Q. Did you ever have any conversation with Mr. Boss with regard to the giving of these particular notes and the purposes for which they were given?

A. Only his instructions to draw them up, and I knew very well the purpose of them.

Q. What were his instructions in regard to drawing them up?

A. Simply to make a note covering a certain number of cars, an individual note for each car,

(Testimony of R. E. Murphy.)

and he would borrow money on them and attach the warehouse receipts.

Q. When Mr. Boss had you make these various memorandums in the journal with regard to capital account and division of earnings, that I have called your attention to there, 159-a and 159-b, was anything said about this deal between him and Peake being a dissolution? A. No.

Q. What did he tell you as to what the nature of the transaction between him and Mr. Peake was?

A. He told me that he bought Mr. Peake's stock.

Q. Do you know whether or not in the ledger there was a capital account for Mr. Boss and Mr. Peake? A. Yes.

Q. And was that in the Boss & Peake books, or in what books? A. In the Boss & Peake books.

Q. Have you examined the ledger, Mr. Murphy? Have you been able to find those accounts?

A. No.

#### Cross-examination.

(Questions by Mr. SMITH.)

How long were you with the Boss & Peake [309—234] Automobile Company?

A. From November to May.

Q. How long were you with Mr. Boss in his business before that time?

A. Two years prior to that.

Q. And after June 1st, or on June 1, 1917, and from that on, the business there was run by Boss & McRell as a partnership, wasn't it?

(Testimony of R. E. Murphy.)

A. Well, I wouldn't say from that date.

Q. Well, when was it run by Boss and McRell as a partnership?

A. The records are from June 19th, though I don't know of any deal that they might have had together; but as far as the bookkeeping is concerned, the only way I can tell.

Q. You don't know of any arrangement they had previous to that to dissolve the Boss & Peake Automobile Company, prior to June 19, 1917?

A. Possibly I do.

Q. What do you know about it?

A. Well, I would have to refresh my memory on the minutes of the meetings, if there were any held.

Q. Isn't it a fact, Mr. Murphy, that you personally signed minutes of meeting for the dissolution of the Boss & Peake Automobile Company, the minutes which I now show you, which are dated June 14, 1917?

A. That corresponds pretty closely with the records, yes.

Q. Will you kindly answer my question? Isn't that the date that you signed that notice of the meeting for dissolution, on June 14, 1917?

Mr. MAGUIRE.—I thought you said minutes instead of notice. Which is it? [310—235]

Q. "Notice calling special meeting of the directors of the Boss & Peake Automobile Co. to consider proposition to dissolve said corporation under and by virtue of Sec. 6701, L. O. L." You



(Testimony of R. E. Murphy.)

signed that June 14th, didn't you?

A. From the records, I should say so.

Q. What is your recollection?

A. I haven't any recollection as to the dates, because I possibly signed it without paying very much attention to the dates.

Q. When was the first knowledge that you had that such a notice as that was going to be given?

A. I couldn't answer that, Mr. Smith. I didn't amount to very much in this thing. It was merely a matter of handing it to me for signature—one share of stock which was not paid for.

Q. It was several days before it was signed, wasn't it, when you knew there was going to be such a notice sent out? A. I couldn't say.

Q. You can't say it was not? A. No.

Q. You cannot say they failed to discuss with you as early as about June 1st that they were going to dissolve?

A. I wasn't consulted at all. It was not discussed with me.

Q. Will you kindly answer the question?

A. This was merely brought in for my signature, without any consultation whatsoever. I didn't put in figures.

Q. You cannot tell when it was you first knew they were going to take these steps to dissolve?

A. No, I cannot.

Q. You cannot deny, however, that it was as early as June 1st or May 31st?

A. No. [311—236]

(Testimony of R. E. Murphy.)

Q. When did you first hear of the partnership between Boss and McRell?

A. I cannot say. McRell put some money in there, but at that time, according to my recollection, it was not decided whether it would continue as a corporation or as a partnership.

Q. When was it that McRell put this money in it?

COURT.—What date was that?

A. I would have to consult the books.

Q. Look up the books and see. That is what I want.

A. I had no knowledge then as to whether it was to continue as a corporation. About what pages were we working?

Q. 159, 159-a and b, 160 to 164.

A. I am talking about the journal.

Q. I don't know the page there. Maybe opposite counsel can tell you.

Mr. REILLY.—What is that?

A. About what pages were we working on?

Mr. REILLY.—About 120.

A. Around June 2. It is dated June 6th.

Q. Then you knew at least as early as June 6th about the partnership, didn't you? A. No; no.

Q. When did you first learn about the partnership?

A. I should say it was around when we finally made the entries on the 19th, closing the corporation books.

(Testimony of R. E. Murphy.)

Q. And you never knew anything about it before then?

A. Possibly I did; but to my recollection, that is.

Q. I will show you these two notes that were called to your attention, the one in blue and the one in yellow. They are marked Boss' Exhibit "D" as one exhibit. They are in your [312—237] handwriting, aren't they, the body of them?

A. Yes.

Q. Do you notice the date up here at the top?

A. Yes.

Q. June 1st, isn't it? A. Yes.

Q. And the first thing it begins is "C. L. Boss Automobile Co. agrees to pay," isn't it? Something of that kind? A. Yes.

Q. Then you knew on June 1st that the C. L. Boss Automobile Company was doing business, didn't you?

A. No, we expected Mr. Peake's name to be dropped from the corporation. We had several conversations as to whether he would continue, whether Mr. Boss would continue with Mr. Peake's name in the business, and our idea was that the corporation name would change.

Q. Whose idea?

A. Mr. Peake and myself, both. We often wondered if he would continue as the Boss & Peake Automobile Company, or would he change the corporation name.

Q. And you still stayed in the employ of Boss after Peake dropped out? A. Yes.

(Testimony of R. E. Murphy.)

Q. And you wrote these notes in the name of C. L. Boss Automobile Company?    A. Yes.

Q. And you were still wondering what name he was going to do business under?

A. Prior to that.

Q. Prior to June 1st?    Oh.    A. Yes.

Q. Then you and Mr. Peake were wondering, prior to June 1st, [313—238] what Mr. Boss was going to do?    A. Yes.

Q. How long prior to June 1st?

A. As long as the conversation was up that Mr. Boss was going to buy Mr. Peake's stock, he wondered if he would continue using his name.

Q. So that before June 1st there was some discussion between you and Peake as to what Boss was going to do? Is that right?

A. Only to that extent.

Q. You knew that there was a contemplated change in the name before June 1st, didn't you?

A. Yes.

Q. How did you get that knowledge?

A. Simply from the fact that they were dicker-ing on the sale of stock, and I knew the feeling between them, and didn't think that Mr. Boss would continue to use Mr. Peake's name in the business after he was out.

Q. With that knowledge, you drew these two documents, putting in the name C. L. Boss Automobile Company?    A. Yes.

Q. These were actually drawn when—June 1st or May 31st?    A. June 1st, I should say.

(Testimony of R. E. Murphy.)

Q. You have no recollection as to the exact date?

A. Oh, well, the date should prove. I will go by the date.

Q. You will go by the date it bears up here?

A. It draws interest from that date.

Q. Did you actually make them up on June 1st or May 31st? A. June 1st.

Q. How did you happen to take that name C. L. Boss Automobile Company? Who told you to use that name? A. Mr. Boss. [314—239]

Q. What time of day do you say you drew those notes? A. I didn't say that.

Q. Isn't it a fact, Mr. Witness, that on June 1, 1917, you knew that Mr. Boss and Mr. McRell had executed this Assumed name agreement that was recorded, and in that agreement they take the name of the C. L. Boss Automobile Company?

A. I never saw that before in my life.

Q. And isn't that the reason you put in C. L. Boss Automobile Company in these two notes?

A. I don't know anything about this.

Q. You never saw this, you say? A. No.

Q. When did you actually know of it?

A. Since this case was started here, in Mr. Logan's office, I think I had the first intimation.

Q. When was that? A. A few weeks ago.

Q. And what was the occasion of your going to Mr. Logan's office to find this?

A. I accompanied Mr. Reilly for some information he wanted.

(Testimony of R. E. Murphy.)

Q. You had been hunting to find this of record, and failed to find it?

A. No, sir, I didn't know of such a thing.

Mr. REILLY.—I had, Mr. Smith; not Mr. Murphy.

Q. And you found a certified copy of it in Mr. Logan's office? A. I didn't. Mr. Reilly did.

Q. Now, after Mr. Peake dropped out of the business up there, you say the business was run along in the same way, just as it was before?

A. So far as any instructions to me were concerned.

Q. Well, did you see anything that indicated a change? A. Oh, yes. [315—240]

Q. What was it?

A. Mr. Peake was not there any more, and Mr. Boss and Mr. McRell were there.

Q. McRell had never been at that place before in the same capacity, had he?

A. I believe in the same capacity, yes.

Q. Mr. McRell was a salesman, wasn't he, before that time?

A. Same work I believe, that he does now. He was territory man.

Q. He was territory man before? A. Yes.

Q. After this, or about June 1st, he came into the business itself, didn't he? A. Yes.

Q. And Peake dropped out?

A. Yes. He continued as territory man.

Q. You knew from that, did you not, that Peake had gone and McRell come in? A. Yes.



(Testimony of R. E. Murphy.)

Q. Now, after Peake dropped out of the Boss & Peake association, how long did you remain with Mr. Boss, or with the association up there?

A. About six months.

Q. What business did you go in then?

A. In the automobile business.

Q. With whom?

A. With Mr. Peake and John Sharp, corporation.

Q. Then, you have been in business with Mr. Peake since then, have you? A. Yes, sir.

Q. When did you first agree to go in business with Mr. Peake— [316—241] before or after June 1, 1917? A. Seven months afterwards.

Q. When did you first talk to him about it?

A. Seven months afterwards.

Q. He has been backing you people financially?

A. He did for a short period.

Q. And concerning the values of some of these contracts for cars and agencies, you represent what agencies?

A. Chandler, Cleveland, Saxon, Roamer and Metz.

Q. They have been canceled, some of them, haven't they, recently?

A. Yes. I forced the cancellation, Mr. Smith.

Q. Anyway, they were canceled?

A. Yes; I forced it.

Q. You and Mr. Peake have been in numbers of consultations about this case, haven't you?

(Testimony of R. E. Murphy.)

A. No, I can't say that we have. I have had very little to say with Mr. Peake.

Q. Do you know anything of the actual terms under which Peake dropped out of the business and McRell came in?

A. Only hearsay. Only as told by the different parties.

Q. You didn't hear any agreement between Boss and Peake on the matter? Didn't hear them talk it over? A. No.

Q. Now, about these trial balances, how often do you say you took off trial balances?

A. Well, I tried to take them off once a month, but I didn't always do it.

Q. Did you take them off in duplicate or singly?

A. Singly.

Q. Did you make any statements there at all, whereby Mr. Boss [317—242] got one and Mr. Peake another of the same statements?

A. No, I don't remember that I did.

Q. Duplicate copies?

A. I simply filed them. They were there for the inspection of either of them, if they wanted them.

Q. Don't you know, as a matter of fact, that both Mr. Boss and Mr. Peake were in constant consultation with those reports you made out, getting at the status of the business?

A. They didn't seem to take much interest, especially Mr. Boss.

Q. How about Mr. Peake?

Mr. REILLY.—Are you talking about trial bal-

(Testimony of R. E. Murphy.)

ances or these alleged satisfactorily estimated statements?

Mr. SMITH.—Whether he calls them trial balances or whether Boss calls them satisfactory statements, it is immaterial.

Mr. REILLY.—You don't claim the two are the same?

Mr. SMITH.—That is what I want to find out from him.

Mr. REILLY.—I just wanted to know what you were inquiring about.

Mr. SMITH.—He will know, now you have told him.

Q. Is that the only balances or only statements you ever took off the books?

A. Yes, as far as I can remember.

Q. You won't say you didn't take off any other?

A. No, I won't say that.

Q. You might have taken off others you don't remember about at this time?

A. At that time I didn't take any.

Q. I am not speaking of any particular specific date; but you don't remember of having taken off any other statements except the trial balances?

[318—243] A. No.

Q. And you cannot say that you didn't?

A. Well, yes, I can. The books were never in shape to take off a satisfactory statement. I was too far behind in my work.

Q. Is this document in your handwriting?

A. Yes.

(Testimony of R. E. Murphy.)

Q. When did you make that?

Mr. REILLY.—Just a moment. May I see it, please?

Q. When did you make that?

A. I couldn't say.

Q. For whom did you make it?

A. For the Government, I believe.

Q. For what purpose did you make it?

A. Income tax return.

COURT.—What is the date of that?

A. It is dated December 30, 1916.

Mr. REILLY.—Five months before this transaction.

Mr. SMITH.—Yes, I understand.

Mr. MAGUIRE.—After the corporation had been in existence six weeks.

Q. Now, isn't that a copy of a statement that you made showing the profits that were made for 1916, and didn't you make that for Mr. Peake at his request, and give it to him, and give Boss that one? A. No, sir; no, sir.

Q. Did you make more than one of that or not?

A. This is my work-sheet. I made an original to file with the Government.

Q. Did you give this to Peake? A. No.

Q. You never discussed it with him?

A. Possibly so.

Q. It does show the profits for 1916, doesn't it?

[319—244] A. Let me see.

Mr. REILLY.—The instrument speaks for itself, I think, your Honor, as to what it shows.

(Testimony of R. E. Murphy.)

Mr. MAGUIRE.—Let him go ahead and explain it. I beg your pardon.

Mr. REILLY.—All right.

A. Yes, it does show the profits for a period.

Q. And those profits are figured up here at this corner, and are no part of those blank answers or questions? Those profits are up there in your own figures in the corner, aren't they?

A. No, those don't appear to be profits. That is a little list of expenses.

Q. That is one set. Isn't this, in fact, the work-sheet that you prepared, from which the return of that corporation was made by Mr. Peake for the year 1916? A. By Mr. Peake?

Q. Yes.

A. No; it would be made by Boss & Peake Automobile Company.

Q. Well, I mean by him for the corporation?

A. I don't know who followed it up after me. I probably sent it in myself.

COURT.—Is that the work-sheet?

A. It is part of the work-sheet. It would take quite a number more of schedules to complete it. Part of the schedule is here in the corner, but the balance is not here.

Mr. SMITH.—We will ask to have this marked, if the Court please, and offer it in evidence.

(Marked Boss Exhibit "K.")

Q. Did you make this document, Boss' Exhibit "K," did you make that up as the business went

(Testimony of R. E. Murphy.)

along, or did you make it up at the end of the year from the trial balance? [320—245]

A. Just at the end of the tax year.

Q. I will show you now these two notes again, Boss' Exhibit "D," the blue one and the yellow one. Why were those two forms used, do you know?

A. I cannot see any significance in the difference of the two forms; probably just as a matter of convenience for stationery, is what I should say. I borrowed from Mr. Peake myself, and the notes may be on different kinds of paper.

Q. That is wholly immaterial. You don't recall anything as to why these two forms were used?

A. I wouldn't know of any reason why, except we happened to have the particular stationery.

Q. Isn't it true that one of these notes represents a car that was on the floor of the business, and the other a car in the warehouse?

A. Well, there is nothing to indicate that, that I would know. I couldn't say as to that. But in a case of that kind I would use either form. I don't see the difference in them.

Q. I call your attention to the body of these notes, that you say you filled in in your own handwriting. The blue one has this language: "Occidental Warehouse & Transfer Co. Warehouse receipt covering 1917 Hudson Super Six, Factory #H-20305." That is on the face of the blue one, isn't it? A. Yes.



(Testimony of R. E. Murphy.)

Mr. REILLY.—That note is green, isn't it, Mr. Smith?

Mr. SMITH.—Well, I will say green.

Q. The other one is yellow. There is no such language in that one, is there? A. No.

Q. You say that there was a capital account there in those [321—246] books of the Boss & Peake Automobile Company? A. Yes.

Q. And you don't find it now? A. No.

Q. Then, do you know what capital Mr. Peake had in and what capital Mr. Boss had?

A. My recollection is that \$30,000—I believe Mr. Peake had one share more; I am not quite sure—149 and 161.

Q. Otherwise, they were equal, weren't they—\$15,000 each? A. That was the idea, yes.

Q. Well, don't you remember that it was true—

A. No, I don't. My recollection is—that one share is what bothers me—it may be that each assigned a share, which possibly might be the case, and in that case it would be equal.

Q. One share went to you from Mr. Boss?

A. Yes.

Q. And one went to the stenographer of Mr. Peake's? Isn't that it?

A. I believe that is correct.

Q. But the capital account was \$15,000 each, they had involved in capital? A. Yes.

Q. Now, when did you say you had this conversation—if I remember your testimony correctly, you claimed to have had a conversation where

(Testimony of R. E. Murphy.)

Mr. Boss wanted to sell you some stock in the Boss & Peake Automobile Company?

A. He wanted me to borrow money from Mr. Peake to buy some stock.

Q. That was after Peake retired or before?

A. My recollection is that it was shortly afterwards, though I wouldn't be sure about it.

Q. Was it before or after you signed that notice that I showed you in these minutes? [322—247] A. I wouldn't be sure of that either.

Q. Was it before or after you wrote in these notes C. L. Boss Automobile Company?

A. I am not able to state the date, Mr. Smith.

Q. So you cannot say, then, when Boss wanted you to buy stock?

A. No, only that it was within a day or two of the terminal. I wouldn't say whether it was a day before or a day after. It was right at the time.

Q. You did have one share of stock in your own name?

A. No, I don't know that I ever saw it.

Q. I say it was in your name? I didn't say it was yours.

A. Yes. I didn't have access to the minutes or anything.

Q. All you had to do as stockholder after June 1st, all the steps you took after this Boss and Peake transaction, was with a view of dissolving the Boss & Peake Automobile Company, wasn't it?

A. Yes, finally.

Q. Now, if you wish to use any of the books in

(Testimony of R. E. Murphy.)

answering these questions, Mr. Witness, just let me know. I will be glad to hand them to you. As I recollect your testimony—I was sitting back there sometimes—as I recollect your testimony, it was substantially to the effect that the paging in the book you were referring to ran regularly—159, 160, 161, etc.; that there were some sheets put in between 159 and 160, making 159-a and 159-b?

A. Yes.

Q. What is your best recollection as to when you actually made those sheets and put them in that book?

A. From reference to the books, I should say June 19th.

Q. Is this it? A. Yes. [323—248]

Q. June 19th? A. Yes.

Q. That would be after you had signed this notice of the meeting, which is dated the 14th, wouldn't it?

A. Yes.

Q. These pages were not put in there with any view of trying to defeat the Government or anybody else out of any income tax, were they?

A. Absolutely not.

Q. And they were *bona fide* transactions, as far as you know?

A. It was the current work as taken up, to catch up with it.

Q. And the reason they did not appear regularly was that you were overcrowded? A. Yes.

Q. You cannot tell just what day those transactions took place?

(Testimony of R. E. Murphy.)

A. Only by using the date that shows that it followed the 15th, and then figuring how many days' work might have intervened.

Q. What I am after is, do you know the actual date any of these transactions took place?

A. No. My only proof is the date June 15th, that it must be after June 15th.

Q. There was never any intent on your part to show a transaction there except in its true light, was there, Mr. Murphy? A. No.

Q. Mr. Boss never tried to get you to do anything that was not absolutely right there, did he?

A. No.

Q. From your talks with him, and your conversations with him, and your work with him, was there ever any indication on his part that he wanted anything in those books except what was just in accordance with the plain facts? [324—249]

A. Yes, there was.

Q. Well, what was it?

Mr. REILLY.—It hasn't anything to do with this transfer of stock? A. No.

Mr. REILLY.—I don't know what is the use of hashing up their differences.

Mr. LOGAN.—That is all we are trying to get at, whether or not there was anything wrong between Mr. Boss and Mr. Peake in the transaction, or that Mr. Boss was trying to change the transaction different from what it was as between himself and Mr. Peake.

Mr. REILLY.—Objection withdrawn.

(Testimony of R. E. Murphy.)

Q. Go ahead.

A. There was a time, prior to the final close-out of the business, that Mr. Boss favored closing on an inventory basis and began taking an inventory at prices that I did not think were fair to Mr. Peake, and I at the time refused to inventory used cars at prices that I thought the cars would not bring on the market, and he asked me at that time if I thought more of Mr. Peake than I did of my job. I told him that that wasn't any consideration with me at all; that any work that I did for him would have to be done strictly according to—

Mr. LOGAN.—Let me interrupt you: What has that to do with changes on the books on the 19th of June? A. Nothing, Mr. Logan.

Mr. LOGAN.—Then none of these changes were made, so far as Mr. Boss' instructions to you, in any way changing the true status between Mr. Boss and Mr. Peake in June? [325—250]

A. No, sir, I don't mean to say that at all.

Mr. LOGAN.—That was the question, and your response was an entirely different proposition.

COURT.—When was this?

A. I should say it was a couple of months before June 1st, when they finally closed out.

(Examination by Mr. LOGAN.)

Q. That was a proposition that failed?

A. It did, yes.

Q. Now, the question that was put to you—if the court and counsel will pardon me for inter-



(Testimony of R. E. Murphy.)

jecting here—was on the framing of pages 159-a and 159-b.

A. It hadn't anything at all to do with that.

Q. There was nothing wrong in any of those transactions, was there? A. No.

Q. There was no misrepresentation of Mr. Peake, was there? A. No, indeed.

Q. There was no intent to help Mr. Boss as against either the Government or Mr. Peake, was there?

A. Oh, no. It was just my own laxity in keeping the work up. When I finally got to it I had to inject those two pages in order to get them into the main business. I had already used pages 161, etc., and simply made a duplicate of 159, designating it as "a" and the reverse side as "b," in order to get it into its proper section of the journal.

(Examination by Mr. SMITH resumed.)

Q. Every item you have in these pages represents a *bona fide* transaction as therein stated?

A. So far as I know. I wouldn't do anything else, I know. [326—251]

Q. There isn't anything there that is not true, is there? A. No.

Q. You say that inventory was along about two months before?

A. That is just guessing roughly. They squabbled all the time they were in business together, and I was looking for a break-up, and it was during one of the squabbles. I couldn't say just when it was.



(Testimony of R. E. Murphy.)

Q. Now, Boss at that time was thinking of buying Peake out, as you say, at the time this inventory stuff came up?

A. I wouldn't know whether he was buying him out or selling to him.

Q. Anyway, there was a proposition up to buy or sell, one way or the other? A. Yes.

Q. You don't know which way it was?

A. Liable to hop either way, as far as I know.

Q. So that if Boss bought Peake, Boss would be charging himself too much on the cars that he was inventorying, wouldn't he?

A. If he used that particular statement, yes.

Q. Now, while you were there, Mr. Murphy, Mr. Peake was in constant touch with the finances of the corporation, wasn't he, after the corporation was formed? A. Yes.

Q. Wasn't he always insistent upon knowing just where the money was?

A. He had to be. That was his end of the business.

Q. Well, he was, wasn't he? A. Yes.

Q. He was insistent upon knowing just where the money was? Did he take up your time or bother you any in your work in [327—252] finding or looking after where the money was?

A. Not to speak of.

Q. Didn't you tell Mr. Boss that Mr. Peake was so insistent on your showing him where the money was all the time that it took up pretty near half your time to show him, or words to that effect?

(Testimony of R. E. Murphy.)

A. No, I don't remember that.

Q. Now, to return to these monthly trial balances, Mr. Murphy: At the time you took off each monthly trial balance, you would show the business for that month, wouldn't you, particularly?

A. Show what?

Q. Show the business for that month, the previous month, as represented on the trial balance?

A. The trial balance does not represent the business for the previous month.

Q. I will show you the ledger at the pages indicated: What account is this before you?

A. It is what I would call a merchandise account.

Q. In keeping your books out there, in running the ledger, you kept a strict account of every item as against each automobile that was sold, didn't you?

A. I tried to do that, but it was too much system.

Q. Too much system?

A. Too much system, yes. I found a better way of doing it.

Q. Take this J. B. Skinner automobile—is that the name there? A. Yes.

Q. That shows the sale price of the machine, does it? A. Yes.

Q. And shows every item of cost and expense and advertising and office— [328—253]

A. No, it shows the expenses that refer directly to the automobile. There is nothing of the overhead or the general expenses.

(Testimony of R. E. Murphy.)

Q. On each machine?

A. Each individual machine.

Q. When did you enter that up as to each individual machine? As of the date of sale, or when?

A. Those came in in dribblets. Those came in in dribblets covering a long period of time.

Q. You tried, then, to keep a detailed statement of each automobile right to date, so that you could tell what profit you had made on each one?

A. That is what I tried to do, yes.

Q. At any time that Mr. Peake had access to these books, he could tell how many cars were sold, couldn't he, by examining this book?

A. No, I don't believe he could. No.

Q. You could tell him, couldn't you?

A. Yes, with quite a bit of work. You understand that all of these accounts go to make one more account. It requires that you must pick out the different automobiles that are delivered from the different pages, and make a transfer to what you call Hudson Merchandise Account; and the segregation of those accounts, after getting in all the different entries of the individual cars, would show the profit or loss on that particular automobile.

Q. We will take as an illustration a theoretical case: Supposing that they were still in business, and you wanted to show the business that was done for the month of May, 1922, and you had sold 20 cars in the month of May, 1922, would they be entered as of the date of the sale to each person to whom [329—254] they were sold, and as many

(Testimony of R. E. Murphy.)

of these expenses put on as you had incurred up to that time and could find out?

A. As many as you knew of, yes.

Q. So your books at the end of the month of May would show all the sales you knew and all the expenses against each automobile that you knew of?

A. Yes.

Q. Mr. Peake had access to these at all times with you?

A. Yes, but there are items that follow—salesman's commission—insurance.

Q. They are minor items, aren't they?

A. They eat up your whole profits sometimes; and the sale of the used car you take in—you might take a used car in at a certain valuation, and when you come to sell it there is a depreciation of a couple of hundred dollars, which you might have overallowed on the car in order to make the sale. So that the credit that you put up against this automobile may be profit and may not be profit. It all depends on what becomes of the car that you traded for.

Q. But from the information that you had, and from your books, and from your trial balances that you took every month, and your being in constant communication with Mr. Peake, Mr. Peake was informed, was he not, as to the profits of the business right along, in a general, substantial way?

A. No. In a general way, but not in a substantial way.

Q. Where do you draw the distinction?

(Testimony of R. E. Murphy.)

A. Well, substantial, I would say, get it down to where your entries are all complete. Generally might be based on an idea of what the business was doing.

Q. I show you Combined Cash and Journal, month of June, 1917, [330—255] page 120. Are these entries over here in your handwriting?

A. Yes.

Q. Is there E. W. A. Peake capital account—is that \$15,000? . A. Yes.

Q. And what is this \$10,000, credit or something of the kind? A. Yes.

Q. Where did you get your information on which you made that entry?

A. I don't know that I could answer that. I believe it is my own idea.

Q. That is in your handwriting, isn't it?

A. Yes. I believe it is my own idea, that whole entry.

Q. Your own idea was that Peake some way pulled down \$10,000 profit? Is that it?

A. No, I had an account of \$15,000 capital account to close out. I didn't know any better way of doing it than taking \$15,000 and posting it opposite the other fifteen, which gave me a ruling in my ledger.

Q. What I am talking about is the \$10,000 item that reads, under Peake, "Do as earnings 11/25 to 5/31, \$10,000." That is in your handwriting there, isn't it?

A. Yes. There should be a ledger account to



(Testimony of R. E. Murphy.)

tell me how I handled that. I cannot tell from this book.

Q. Is this your ledger? A. No.

Q. Is there a book here that you want to refer to?

A. It is the pages that are missing. The ledger is here, but the capital accounts are not in it.

Q. Well, now, I will show you again. You don't mean to say that \$10,000 is a capital account?

A. I can only tell by referring to the ledger sheet how I [331—256] handled it.

Q. You segregated it so that you have \$15,000 capital account, haven't you, right here?

A. I needed that particular amount in order to balance the company books.

Q. Three lines below that is this \$10,000 account —\$10,000 charge.

A. That is, in all likelihood, posted in the same account with the \$15,000.

Q. And what is this entry? What does it say there? What have you got in there as to that \$10,000? How does it read?

A. "Ditto, earnings 11/25 to 5/31."

Q. You wouldn't put earnings in the capital account, would you?

A. Yes, I would. That is the trouble.

Q. I should say it would be a trouble.

A. Well, I don't know that it is, either. I should say yes, that is where it belonged. It looks to me that way—I don't know.



(Testimony of R. E. Murphy.)

Q. I will show you now this journal at page 159 and 159-a; those entries there are all in your handwriting, aren't they? A. Yes.

Q. Do you find over here, next to the last line, there is profit and loss account? Is that right?

A. Yes.

Q. You have profit and loss \$10,000 on the debit side? Is that right? A. Yes.

Q. And profit and loss "Do" \$11,373.32, and under that you have "E. W. A. Peake, dividend per agreement," haven't you? A. No. [332—257]

Q. What is that? A. Interest.

Q. Interest—excuse me; I couldn't see it—"Interest per agreement." Is that right? A. Yes.

Q. Right under that, "C. L. Boss 1/2 profits, \$11,373.32." Where did the other profits go to?

A. Peake would get that in the sale of his stock.

Q. In the sale of his stock. Don't your books show that he sold his stock for the \$15,000 face par value of the stock, and that the \$10,000 was pulled down as a dividend?

A. No. The books were not made up at the time. There was no way of arriving at what a division of the profits would be at that time.

Q. Why have you got this entry here under profit and loss account of the \$10,000, Peake, and eleven thousand and so on to Boss, when you now say it should be in the capital account?

A. I don't say that this should be in the capital account.

Q. Are those the same entries, that \$10,000 to

(Testimony of R. E. Murphy.)

Peake, the same as the \$10,000 to Peake in the other book I called your attention to?

A. One is a debit and one is a credit. They are offsetting entries.

Q. Offsetting. They relate to profit and loss account, and not to capital account, don't they, the \$10,000 entry?

A. No, no. Your profit and loss account is closed.

Q. Closed by the entry of \$10,000 to Peake and \$11,373 to Boss?

A. No. There is \$41,524.98. This may dissipate the profits. It may close the profit and loss account out. The discrepancy is due to the fact that there were not any figures to make the [333—258] settlement on when they made it, outside of the straight sale of stock. It later developed that there was \$1373.32 made by Mr. Boss on the transaction above what—

Q. There was how much made by him on the transaction?

A. \$1373.32. That is what that would indicate.

Q. Don't you know that that was Boss' one-half of the estimated expenses, and that the other thirteen hundred came from Peake?

A. No. This bookkeeping was done by me, as a matter of curiosity, to see how the thing finally would end itself up.

Q. It is a curiosity, I admit.

A. Probably so, but that was the purpose of it—my own initiative. Nobody suggested that I close

(Testimony of R. E. Murphy.)

them out that way, but I was just a little bit curious to see how it finally would end up.

Redirect Examination by Mr. REILLY.

Q. These entries about which you have been asked, in the journal, pages 159-a and 159-b, and these entries in the combined cash and journal under date of June 2, were those made after the transaction between Mr. Peake and Mr. Boss had been closed? A. Yes

Q. And did Mr. Peake have anything to do with the manner in which you showed these figures or put these figures into the books? A. No.

Q. Was the stock transferred and Mr. Peake completely out of the business when those figures were put into the books? A. Yes.

Mr. SMITH.—Stock transferred—of course, that—

Mr. REILLY.—The stock was transferred. It has been admitted that the stock was transferred. Although your pleadings don't admit it, your own witnesses have admitted it. We are not [334—259] making any violent presumption.

Q. Now, I notice, Mr. Murphy, in this combined cash and journal at page 120, about which you have been asked, that there is an entry there of \$26,137.15, stated, "C. L. Boss, by check, Capital account." Did that money ever actually go into the corporation?

COURT.—What was that?

Mr. REILLY.—There is a check given by Boss,

(Testimony of R. E. Murphy.)

the check that he gave to Peake—it was his personal check—he borrowed part of that money on his house, etc. It shows in the books, however. What I want to ask is, Did that \$26,137 represent anything that came into the corporation at all, or was that part of the entry, independent of the corporation's business, to clear these accounts up that you had? A. Well, sir; I couldn't say.

Q. What is that?

A. I couldn't say. I don't know.

Q. I think it probably speaks for itself. Is the item to which I have called your attention represented by the check that Mr. Boss gave to Mr. Peake, can you tell from your books?

A. I should say that it was.

Recross-examination.

Q. Can you tell what items make up that \$26,137.15, from all your books together?

A. It is here some place. I don't know just where it is. Let me see the ledger, will you, please. Perhaps the sheets that I am looking for are exhibits. Well, I can tell offhand, without getting at the exact figures. \$25,000 was for purchase of stock, a certain amount was salary that was drawn, and a certain amount was for furniture. [335—260]

Q. Who told you that \$25,000 was for purchase of stock?

A. Why, both Mr. Boss and Mr. Peake told me.

Q. Now, turn to page 159 again, 159-a, and also to the combined cash and journal at page 120.

(Testimony of R. E. Murphy.)

You stated awhile ago there was no misrepresentation in any of these entries, didn't you?

A. Yes, sir.

Q. These entries show \$15,000 for capital and \$10,000 for dividend, don't they? A. Yes.

Q. Then, how do you work that out that that makes \$25,000 for stock?

A. I don't see that there is any misrepresentation. It is my way of keeping the books, is all. If there is any fault to it, it is because I didn't know any better.

Q. You have been indebted to Mr. Peake up to within a very short time?

A. No, no; not to speak of. It has been over a year or so. Mr. Peake always had more of mine than I had of his when I borrowed from him.

Q. Peake is in business with you?

A. No, sir. Was in 1918. I haven't borrowed from him for two years.

Excused. [336—261]

### **Testimony of John F. Reilly, for Defendant.**

JOHN F. REILLY, called as a witness on behalf of defendant Peake, being first duly sworn, testified as follows:

#### **Direct Examination.**

(Questions by Mr. MAGUIRE.)

Your name is John F. Reilly? A. Yes.

Q. I will ask you, Mr. Reilly, whether or not you represented Mr. Peake in appearing before the of-



(Testimony of John F. Reilly.)

fice of the Collector of Internal Revenue, in this city, some time in 1920?

A. I did; when Mr. Peake got an envelope through the mail addressed to him, and on the inside of the envelope was a statement of a tax due from the Boss & Peake Automobile Company to the Government, which is in evidence here. It was either Government's Exhibit 2-A, or one similar to that.

Q. Did you proceed to that office?

A. I went down with Mr. Peake.

COURT.—What is that?

A. That is not a check, your Honor. It is notice and demand for tax, and it is addressed to Boss & Peake Automobile Co., 615 Washington St., Portland, Oregon. It came in that form, your Honor, in an envelope addressed on the outside "E. W. A. Peake, Esq., Dekum Building, Portland, Oregon"; that being Government's Exhibit 2-B, the envelope. I went down to the collector's office, and was referred to—saw Mr. Walker. And I took Mr. Peake with me, and I asked Mr. Walker if the Government—

Mr. HUMPHREYS.—What is the purpose of this?

A. The purpose is to show there is no demand.

Mr. HUMPHREYS.—The Government cannot be bound by what [337—262] conversation took place between an agent and Mr. Reilly. This demand speaks for itself. The notice is here, and in addition to that there is a letter there signed by



Mr. Peake, addressed to the collector of internal revenue, to show that he treated what he received as a demand upon him individually. I submit to your Honor the rights of the Government in this matter cannot be prejudiced in any way by any conversation between Mr. Reilly and any gentleman in the Custom-house.

Mr. MAGUIRE.—The Government has offered in evidence here a notice and demand for tax which is not addressed to the defendant Peake, but is addressed to the corporation.

Mr. HUMPHREYS.—In connection with that a letter from Mr. Peake relating to it.

Mr. MAGUIRE.—Exactly so. Now, I propose to prove by this witness that no demand was made, and that the collector of internal revenue's office and his deputy, who by law are the only persons who can make legal demand for payment of the tax, refused to make demand.

Mr. HUMPHREYS.—This was a demand, your Honor, and is so pleaded.

Mr. MAGUIRE.—It is not a demand upon the defendant Peake.

COURT.—Is this offered for the purpose of defeating the tax?

Mr. MAGUIRE.—It is offered for two purposes: It defeats beyond any question, your Honor, any right to either penalty or interest upon the tax. There isn't any question about that whatsoever. And there is a very serious question, your Honor, whether it doesn't defeat the tax so far as the de-

(Testimony of John F. Reilly.)

fendant Peake is concerned. Where the law says that a demand shall be made in certain form, and the regulation provides a certain [338—263] form, and that demand is not made, but a demand upon a corporation is made, and the person to whom the demand is mailed goes to the collector of internal revenue and says "If you want me to pay any of this tax, if that is what you put it in the mail for, make a demand upon me," and the collector of internal revenue or his deputy refuses to make the demand, then the Government cannot recover the tax from the individual, and particularly cannot recover penalty or interest from the individual.

COURT.—I will hear the testimony.

Q. Is Mr. Walker deputy collector of internal revenue?     A. He is.

Q. What conversation did you have with Mr. Walker with regard to this tax?

A. I said to Mr. Walker—asked him whether this was a demand upon Mr. Peake, pointed it out to him it was addressed to Boss & Peake Automobile Company. "Well," he said, "do you admit that you have any of the assets of the Boss & Peake Automobile Company?" And I said, "No." He said, "If you have any of the assets, you will have to pay the tax." I said, "Let's see the return that was made by the Boss & Peake Automobile Company that this tax was based on." And he said, in effect—I can't give you his exact language—that he would only let me see it if we would admit that we had part of the assets of the Boss & Peake

(Testimony of John F. Reilly.)

Automobile Company. In other words, he would let us see it if we would admit we owed whatever the tax was. And I then called his attention to the fact that this was not a demand upon Mr. Peake; that we did not want to get into a controversy with the Government, but that we could not—that the way this notice was sent, Mr. Peake could not pay [339—264] that tax, that half of the tax that seemed to be wanted from him and that is now being sued for, and recover from anybody, because, there not being a demand, it would be a voluntary payment, and he could not go back at the Government and show that the tax was not payable by him, because he would have made a voluntary payment. And I said, “Now, if you are taking the stand that Mr. Peake should pay any part of this tax, serve a demand on us.” And it seemed to amuse the gentleman quite a little bit, and he told me that they would not do anything further than they had already done; if we owed the money, we could pay it, but if we didn’t, why, he wasn’t concerned, but he wouldn’t make a demand.

Q. Was there anything else that took place at that time, Mr. Reilly?

A. I believe that that conversation was repeated about the demand, I think on at least two occasions this same conversation about the demand occurred, in which I pointed out to him that we were helpless in the matter, and could not avoid a controversy with the Government unless a demand were made on us. And he refused to make the demand. I

(Testimony of John F. Reilly.)

think that occurred in two conversations at least, that is all the conversations I had.

Cross-examination.

(Questions by Mr. HUMPHREYS.)

Do I understand you, Mr. Reilly, to say that the gentleman down there said in words he would not make a demand, or that he would simply do nothing further than had been done?

A. I cannot swear that he used the words, "I will not make a demand." I can swear that he refused my request that he [340—265] address a demand to Mr. Peake.

Q. And that was after he had sent the envelope which is here in evidence, addressed to Mr. Peake, by which it was mailed?

A. Yes, the envelope was addressed to Mr. Peake; not the contents.

Q. You say the envelope was addressed to Mr. Peake and not the contents?

A. The contents were addressed to the Boss & Peake Automobile Company.

Q. If the envelope was addressed to Mr. Peake, why weren't the contents addressed to him?

A. You will have to ask Mr. Walker, or somebody down there in the Government.

Q. Do you say that when a thing is addressed to a person in an envelope, the contents are not addressed to the individual whose name is on the envelope sent through the mail?

A. Certainly, Mr. Humphreys. Frequently mail is sent addressed to me on the outside, and when I

(Testimony of John F. Reilly.)

get on the inside I find that it is addressed to the O. W. R. & N. Company, and that I haven't a thing to do with it.

Q. And this was sent merely as a species of entertainment of the revenue officers, then?

A. Well, I am sure they didn't seek your advice before they did that.

Q. Now, did you dictate the letter which is dated August 18, 1920, and signed E. W. A. Peake?

A. I presume I did, Mr. Humphreys. I really haven't any distinct recollection of whether I dictated this letter or not.

Q. Are you able to say whether it was before or after you [341—266] went to the Custom-house?

A. I believe it was—I know, in fact, that it was before I made this last request for demand.

Q. And if you didn't consider that the notice in the registered envelope, Government's Exhibit 2, was a demand upon Mr. Peake, what was the purpose in writing this letter to which I have just referred?

A. Partly because we could not get them to make a demand, and obviously, if Mr. Peake could avoid a controversy with the Government, I wanted to enable him to avoid it.

Excused.

Mr. MAGUIRE.—Defendant Peake rests, may it please the Court.

Recess until 2 P. M. [342—267]



Portland, Oregon, July 7, 1922, 2 P. M.

**Testimony of C. L. Boss, in His Own Behalf (Recalled in Rebuttal).**

Direct Examination.

C. L. BOSS, recalled in rebuttal.

(Questions by Mr. SMITH.)

Did you hear the testimony of the witness Murphy, I believe he is the bookkeeper—is that his name?     A. Yes.

Q. Did you hear his statement as to your having requested him to buy any stock in the Boss & Peake Automobile Company?     A. Yes.

Q. Tell the Court about that circumstance, whatever there was to it.

A. I never offered any stock in the Boss & Peake Automobile Company; never contemplated keeping the Boss & Peake Automobile Company running at any time; never negotiated with anybody for selling Boss & Peake Automobile Company stock.

Q. Do you know how soon Mr. Murphy was informed of the transaction whereby you and Mr. McRell were to become the C. L. Boss Automobile Company?     A. Before the dissolution.

Q. When, in relation to these notes that he wrote up, of June 1st?

A. We had a short talk at that time.

Q. Now, concerning the talk that you and Mr. Peake had at the depot, tell the Court, please, where Mr. McRell was at that time. [343—268]

A. Right beside of me, just as he states in his testimony.



(Testimony of C. L. Boss.)

Q. And at the transaction at the First National Bank, I wish you would tell the Court fully everything that transpired there at the First National Bank, how the checks were passed, where the deposit was made, where Mr. McRell was, and the whole thing, just briefly.

A. We all met at the bank.

Mr. REILLY.—If the Court please, I don't believe this is rebuttal. The witness has gone fully through this, and my recollection is that Mr. Peake did not testify on the subject except on cross-examination.

COURT.—This witness testified about that.

Mr. SMITH.—Not fully.

Mr. REILLY.—Very fully.

Mr. SMITH.—Besides that, Mr. Peake attempted to state that Mr. McRell was not there at the immediate transaction at the bank; that he may have been in the bank, but that he was not right at the transaction. I want to show he was.

Mr. REILLY.—You may ask where Mr. McRell was. I don't think you ought to have this witness hash over this whole thing.

COURT.—You may ask about Mr. McRell.

A. Mr. McRell was there, and he stayed there during the entire transaction, and after the transaction was over, we left and went over to Mr. Logan's office.

Q. Do you know whether Mr. Peake took that twenty-six thousand dollar check over to another

(Testimony of C. L. Boss.)

bank, or did he deposit it there in the First National Bank as part of that transaction?

A. He waited until the deposit was made, and went to the window with me to see that my deposit was made, and then he [344—269] deposited it right there before we left.

Excused.

Mr. SMITH.—We have one other witness—Mr. McRell.

Mr. REILLY.—What do you expect Mr. McRell to testify to?

Mr. SMITH.—We expect to prove by Mr. McRell that McRell will say that he was personally present at and was practically participating in that transaction at the bank; that he knew all about it, was where he would know, and could state what transpired; and that he would testify the same as Mr. Boss.

Mr. REILLY.—I think we will concede that Mr. McRell, if here, would so testify.

Mr. SMITH.—That is all. Mr. Boss rests.

Mr. MAGUIRE.—We have no further testimony, your Honor.

Mr. REILLY.—Defendants Boss and Peake stipulate that the testimony in this case may be transcribed, with an original and two copies, at the joint expense of these two defendants, each to pay 50 per cent of the reporter's bill for that service; and it is further stipulated that, in the final settlement of the case, if either of the defendants prevails against the other, the party prevailing shall

be entitled to charge as costs the 50 per cent of the reporter's bill that he has paid.

Is that satisfactory, Mr. Logan?

Mr. LOGAN.—That is agreeable. [345—270]

Portland, Oregon, December 23, 1923.

I hereby certify that the foregoing transcript, consisting of pages 1 to 270, inclusive, is a full, true and correct transcript of the testimony in the case of the United States vs. Boss & Peake Automobile Company, a corporation, tried between the dates of May 22, 1922, and July 7, 1922, in the District Court of the United States for the District of Oregon, before Charles E. Wolverton, U. S. District Judge, and reported in said Court by me.

MARGARET A. FLEMING,

Reporter U. S. District Court, District of Oregon.

Statement of the Evidence. Filed February 19, 1923. G. H. Marsh, Clerk. [346]

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AND AFTERWARDS, to wit, on the 19th day of February, 1923, there was duly filed in said court a stipulation as to exhibits, in words and figures as follows, to wit: [347]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Stipulation as to Exhibits.**

The parties by counsel agree that in printing the transcript on appeal, the exhibits may be omitted therefrom, but that the said exhibits shall be sent by the Clerk of the U. S. District Court for the District of Oregon to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for use on the appeal by either party.

Dated at Portland, Oregon, this 19th day of February, A. D. 1923.

THOS. H. MAGUIRE,

Asst. Attorney for Plaintiff.

JOHN F. LOGAN and

I. N. SMITH,

Attorneys for C. L. Boss and the Boss & Peake  
Automobile Company.

JOHN F. REILLY,

WINTER & MAGUIRE,

Attorneys for E. W. A. Peake.

Filed February 19, 1923. G. H. Marsh, Clerk.  
[348]

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AND AFTERWARDS, to wit, on Monday, the 19th day of February, 1923, the same being the 90th judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [349]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Order Directing Exhibits to be Sent to Appellate  
Court.**

Based upon the stipulation of the parties hereto concerning the exhibits in this case, it is now,

ORDERED that the Clerk of the above court send the original exhibits introduced in evidence in the trial of the above cause to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California, and that such exhibits be forwarded at the time the record in the above cause is sent for filing.

Dated at Portland, Oregon, this 19th day of February, 1923.

CHARLES E. WOLVERTON,  
District Judge Who Tried Said Cause.

Filed February 19, 1923. G. H. Marsh, Clerk.  
[350]

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AND AFTERWARDS, to wit, on the 21st day of February, 1923, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [351]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Praecipe for Transcript of Record.**

To the Honorable George H. Marsh, Clerk of the  
District Court of the United States for the Dis-  
trict of Oregon:

You will please prepare a transcript on appeal herein, including the following papers, to wit: Judgment-roll herein, including the amended bill of complaint, the answer of the defendant E. W. A. Peake thereto, the answer of defendant Boss &



Peake Automobile Company, a corporation, thereto, the answer of defendant Charles L. Boss thereto and the pleadings between Charles L. Boss and E. W. A. Peake and all replies in said case to each answer; also the decree of the Court; also the certificate of the clerk.

Also include in the transcript the opinion of the Court in deciding the case; the transcript of the evidence settled as a statement of the case and the stipulations relative thereto, together with the order of the Court so settling such transcript; the stipulation and order concerning sending the exhibits to the clerk of the Appellate Court and not printing such exhibits.

Also the petition for appeal and order allowing the same; the assignment of errors; the bond on appeal and supersedeas bond and order approving such bond; the citation and acknowledgment of service; this praecipe and acknowledgment of service and the certificate of the clerk.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company  
and C. L. Boss. [351½]

Due service of the foregoing praecipe admitted this 19th day of January, 1923.

THOS. H. MAGUIRE,

Asst. U. S. Attorney,

For Plaintiff.

JOHN F. LOGAN and

ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company,  
a Corporation.

ROBERT F. MAGUIRE,

By W. G. SMITH,

Attorneys for E. W. A. Peake.

Filed February 21, 1923. G. H. Marsh, Clerk.  
[352]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, hereby certify that the foregoing pages numbered from 4 to 352, inclusive, constitute the transcript of record upon appeal in a case in said court in which the United States of America is plaintiff and appellee and Boss & Peake Automobile Company, a corporation, and E. W. A. Peake are defendants and appellees, and C. L. Boss is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true, and com-

plete transcript of the record of proceedings had in said court in said cause in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$89.05 and that the same has been paid by the said appellant.

I return with the said transcript attached thereto the original citation in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said district, this 22d day of March, 1923.

[Seal]

G. H. MARSH,  
Clerk. [353]

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[Endorsed]: No. 3996. United States Circuit Court of Appeals for the Ninth Circuit. C. L. Boss, Appellant, vs. The United States of America, Boss & Peake Automobile Company, a Corporation, and E. W. A. Peake, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 26, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the District Court of the United States for the  
District of Oregon.

No. L—8786.

February 26, 1923.

UNITED STATES

vs.

BOSS & PEAKE AUTOMOBILE COMPANY and  
C. L. BOSS and E. W. A. PEAKE.

**Order Enlarging Time to and Including March 28,  
1923, to File Record and Docket Cause.**

Now, at this day, for good cause shown, it is  
ORDERED that the time within which to file the  
transcript of record on appeal in the above-entitled  
cause and to docket the same in the United States  
Circuit Court of Appeals be and the same is hereby  
extended to and including March 28, 1923.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 3996. United States Circuit  
Court of Appeals for the Ninth Circuit. Order Un-  
der Subdivision 1 of Rule 16 Enlarging Time to  
and Including March 28, 1923, to File Record and  
Docket Cause. Filed Mar. 2, 1923. F. D. Monck-  
ton, Clerk. Refiled Mar. 26, 1923. F. D. Monck-  
ton, Clerk.